SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1772

SOUTHERN CALIFORNIA GAS COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Reply Brief for Southern California Gas Company Addressed to Argument First Raised in Briefs in Opposition.

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Supreme Court Rules.

Southern California Gas Company (SoCal), submits this brief in accordance with Supreme Court Rule 24, subparagraph 4, which states:

> "Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs." (U.S. Sup.Ct. Rule 24.4, 28 U.S.C.A.)

Question Presented.

Whether the issues raised by the interim curtailment orders issued by the Federal Power Commission (Commission) are now, or will shortly become, moot because of subsequent Commission action.

Statement.

On May 24, 1974, SoCal respectfully requested that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, styled *American Smelting and Refining Company v. Federal Power Commission*, 494 F.2d 925, entered on January 21, 1974, affirming in certain respects Opinion Nos. 634 and 634-A of the Commission, entitled "Opinion and Order Prescribing Interim Emergency Curtailment Plan", issued October 31, 1972, and "Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing", issued December 15, 1972. These orders are reported at 48 FPC 931 and 48 FPC .... (1972), respectively.

Opinion Nos. 634 and 634-A prescribed a curtailment plan for the El Paso Natural Gas Company (El Paso) system which, once having insured service to human-needs customers, ignored the historical contractual relationship between the pipeline company and its customers. As stated in SoCal's petition for writ of certiorari, the Commission had previously approved such contractual relationship between El Paso and its customers repeatedly through the continuous issuing of certificates of public convenience and necessity. It is the unlawful setting aside *for all time* of this historical contractual relationship by the Commission in the absence of substantial evidence in the record and the unlawful abrogation of such contracts in clear derogation of the due process guaranties of the Fifth Amendment to the Constitution of the United States and of the Natural Gas Act of 1938, 52 Stat. 821-833, as amended, 15 U.S.C. §§717-717w, that compelled SoCal to seek review before this Supreme Court.

Since the filing on May 24, 1974, by SoCal before this Supreme Court, the Commission issued its Opinion No. 697, on June 14, 1974, entitled "Opinion and Order Prescribing Permanent Curtailment Plan and Complying with Court Remand of Interim Plan", which is appended hereto as Appendix A.

In their brief in opposition (Mimeo p. 5) American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*) contend that by virtue of the prescribing of the permanent plan in Opinion No. 697, the issues now before this Supreme Court will become moot in the very near future.

A similar argument is advanced by Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation and Tucson Gas & Electric Company (APS, *et al.*) in their brief in opposition (Mimeo p. 10).

Because the briefs in opposition have raised for the first time the issue of whether the Commission's issuance of Opinion No. 697 will shortly cause the issues now before this Supreme Court to become moot in the very near future, SoCal is filing this reply brief.

ARGUMENT.

Neither the Issuance nor the Effectiveness of Opinion No. 697 Will Cause the Issues Before This Supreme Court to Become Moot.

While the issue of mootness, by virtue of subsequent Commission action in prescribing a permanent curtailment plan, has not previously been raised in this proceeding requesting the issuance of a writ of certiorari, this very issue was raised by the United States Court of Appeals for the District of Columbia Circuit during the oral arguments on September 20, 1973, before that Court. The Court of Appeals was specifically concerned with the provision of the Commission's Opinion No. 634 (R. 13368) which stated that the interim plan would be effective until October 31, 1973, or until a permanent curtailment provision was approved, whichever was earlier. The Court inquired of counsel whether the issues in this proceeding would become moot if it failed to act before the Commission issued its opinion on a permanent plan. Mr. K. R. Edsall, Counsel for SoCal responded [Tr. 20-21, Hoover Reporting Company, Washington, D.C.]:

> "Your Honors asked other counsel about whether or not this case is moot. I would like to address myself to that first if I may to say to your Honors that it is not insofar as the California petitioners are concerned.
>
> "QUESTION: We mean will it be moot on October 31st.
>
> "MR. EDSALL: No, your Honor, it will not be, I respectfully submit to you for this reason. In Opinion 634, the Federal Power Commission took our contracts with El Paso and put them in

the wastebasket. It failed to recognize any contractual rights between El Paso and the California customers in its decision. In effect, it rendered those contracts null and void.

"It was impossible for us to let that decision become final because had it become final, there would be no redress for us again to argue that point. Therefore, in order to preserve our contention and our claim that our contracts with El Paso are indeed valid and binding and are indeed a mandate upon the Commission under certain circumstances not covered by the case of *Louisiana Power & Light*, we had to come to this Court at this time, and we would like the Court to reverse the Commission, remand the case, direct the Commission to prescribe a curtailment plan for the interim period that should have been prescribed in accordance with what we hope this Court will tell the Commission."

The Court of Appeals in its decision in *American Smelting, supra*, upheld the Commission's action in setting aside the contracts by stating (494 F.2d at 934):

"Having found that then existing [based on the historical contractual agreements] curtailment procedures for El Paso's Southern Division were discriminatory, the Commission was authorized to promulgate substitute procedures. To the extent the illegal curtailment plan was reflected in customer service contracts, *such contracts were also superseded by the Commission's orders.*" (Emphasis added).

While SoCal vigorously opposes the Court's characterization of the historical contractual relationship be-

tween El Paso and its customers, it is clear that the Court disposed of the contractual issues before it and did not consider that such issues would become moot when the Commission took future action in promulgating a permanent curtailment plan. The Court recognized that, since the Commission had determined the historical contracts to be violative of the Natural Gas Act for the purposes of an interim plan, the Commission had in fact set aside the contracts for all time.

There can be little doubt that the Commission, as evidenced by its decision in Opinion No. 697, also considered the contractual issues to have been finally disposed of by Opinion Nos. 634 and 634-A. Thus, the issue which SoCal wishes this Supreme Court to determine constitutes a true "case and controversy" as that phrase has been interpreted by this Court.

The Commission in Opinion No. 697 set forth in a general fashion a curtailment plan for the El Paso system which is to ultimately supersede the interim plan promulgated in Opinion Nos. 634 and 634-A.

The most important aspect of Opinion No. 697, for the purposes of the pending petition for writ before this Supreme Court, is that the Commission therein did not even discuss the contractual issues for which SoCal is seeking review before this Court. Such issues were raised by SoCal in its numerous briefs both to the Administrative Law Judge as well as to the Commission during the proceedings held to determine the need for a permanent curtailment plan on El Paso's system.

The Commission in Opinion No. 697 (Mimeo p. 34) did, however, adopt the Administrative Law Judge's initial decision of June 5, 1973, which is ap-

pended as Appendix B, as part of its opinion to the extent it was not inconsistent. The Administrative Law Judge in his initial decision in addressing himself to the Commission's treatment of the historical contractual relationship and the historical method for curtailment thereunder stated (Mimeo p. 7):

> "It [the Commission in Opinion No. 634] found the current rules [then based on the historical contractual agreements] to be discriminatory and violative of Section 4(b) of the Natural Gas Act. The Presiding Judge would so find on the basis of the record even absent a Commission holding. However, that holding appears to foreclose further consideration of the question. If the currently effective plan is discriminatory and unlawful for a temporary period, one can hardly contend with any conviction that it can properly be retained permanently. It is as improper for the future as for the present, and for the same reasons."

The Commission by its issuance in Opinion No. 697, of a permanent curtailment plan changed in some aspects its interim plan but continued unchanged in any way its unlawful abrogation of the historical contracts upon which El Paso constructed its system and upon which SoCal has relied, now, to its severe detriment. Indeed, Opinion No. 697 continues the decision in Opinion Nos. 634 and 634-A in unlawfully setting aside SoCal's contractual rights, and such is clear from the Commission statement in such opinion that (Mimeo p. 4):

> "We had determined at the time of the Court's decision [in *American Smelting, supra*] that a

> permanent plan for El Paso *virtuallly identical to the interim plan* would best serve the public interest, and were preparing to issue a final order to that effect. However, we could not issue a permanent plan so closely approximating the interim plan without resolving those aspects of the interim plan which the Court had found to be inadequate." (Emphasis added).

Since the Court had upheld the Commission's position on the contractual issues, the Commission merely adopted the Administrative Law Judge's decision on such issues and continued to unlawfully set aside the historical contracts.

Supreme Court precedent dictates that the issues in this proceeding have not been rendered moot by the issuance and will not become moot upon the effectiveness of the Commission's actions in Opinion No. 697. A similar situation arose before this Court in *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1934). In *Panama* the Secretary of the Interior had duly promulgated regulations under an Executive Order of the President for the implementation of the National Industrial Recovery Act of 1933, 15 U.S.C. §§700, *et seq.* Plaintiff brought suit to restrain the defendants, who were federal officials, from enforcing certain aspects of the regulations on the basis, *inter alia,* of an unconstitutional delegation of legislative power to the President. Subsequent to the instituting of the suit by plaintiffs, the regulations were amended by the Secretary of the Interior. Thus, the question of whether the subsequent agency action in amending the earlier regulations, which were the subject of plaintiff's action, rendered plaintiff's case moot was clearly placed before this Court.

This Court in rejecting the arguments for mootness stated (293 U.S. at 413-414):

> "Regulations IV., V. and VII., issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations *continue substantially the earlier requirements,* and expend them. They present the same constitutional questions, and the cases as to these are not moot." (Citations omitted, emphasis added).

It is clear from the above analysis of the Commission's actions in issuing Opinion Nos. 634 and 634-A and in issuing Opinion No. 697, that the Commission in promulgating its subsequent permanent curtailment plan has merely slightly amended its actions taken in promulgating its interim plan, and the permanent plan continues almost in total the earlier requirements and therefore the contractual issues raised before this Court are not moot.

ASARCO, *et al.,* in their brief in opposition (Mimeo p. 6) rely upon *De Funis v. Odegaard,* .... U.S. ...., 40 L.Ed.2d 164 (1974) and *North Carolina v. Rice,* 404 U.S. 244 (1971). ASARCO's reliance upon such cases is misplaced. *De Funis* concerned alleged unlawfully discriminatory admission procedures by a state university law school. Plaintiff therein brought the action on his own behalf and not as a class action seeking an injunction commanding the law school grant him admittance. The trial court granted the request, but on appeal the Washington Supreme Court reversed the judgment. Plaintiff, however, had already been admitted to the law school. By the time the case was before this Supreme Court, plaintiff was registered for

his final quarter and counsel for respondents made clear that the law school would not seek to abrogate such registration. In view of the fact that all parties agreed that the plaintiff was entitled to complete his legal studies at the law school, this Court stated that a determination of the legal issues was no longer necessary to compel that result, and could not serve to prevent it. This Court then concluded that since plaintiff had been accorded his remedy and had been irrevocably admitted to the final term of the final year of law school (40 L.Ed.2d at 169):

> "The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" [Citation omitted].

Since SoCal clearly has not been granted anything akin to a remedy in this proceeding and since the unlawful setting aside of its contract continues unabated and causes volumes of gas to which SoCal is entitled to flow daily to the east-of-California customers of El Paso, the *De Funis* case has no applicability to this proceeding.

Of even less relevancy to this proceeding than *De Funis* is *North Carolina v. Rice, supra.* In *Rice,* the respondent was arrested for driving while intoxicated, tried in a county court, and sentenced to nine months imprisonment with sentence suspended upon payment of $100 fine and costs. On Appeal he was tried *de novo* in Superior Court, found guilty and sentenced to two years imprisonment. The Federal Court of Appeals on appeal from denial of federal *habeas corpus* held that the more drastic sentence on the second trial

was a denial of federal due process in that by discouragement it impinged upon the State-given appeal. The Federal Court of Appeals further held that although Rice had already been completely discharged by North Carolina such discharge did not moot the case on *habeas corpus* because injurious consequences from the conviction might still obtain. This Supreme Court determined that the issue of mootness had been improperly disposed of by the Federal Court of Appeals and, setting forth the proper guidelines upon which to determine the issue of mootness, remanded the case to the court below.

The contractual issues raised by SoCal in its petition for writ of certiorari filed herein are clearly not mooted by the issuance of the Commission's Opinion No. 697 and will not become moot by virtue of the effectiveness of such opinion. The Commission has unlawfully set aside El Paso's historical contractual relationships with its customers and it is continuing such unlawful action in Opinion No. 697.

Conclusion.

For the foregoing reasons, the issues raised by SoCal in its petition for a writ of certiorari are not moot and the writ should be granted.

Respectfully submitted,

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General Counsel for Petitioner, Southern California Gas Company.

THOMAS D. CLARKE,
Attorney.

August 30, 1974,

APPENDIX A.

Opinion and Order Prescribing Permanent Curtailment Plan and Complying With Court Remand of Interim Plan.

United States of America, Federal Power Commission.

El Paso Natural Gas Company, Docket No. RP72-6. Opinion No. 697.

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United States of America, Federal Power Commission.

CURTAILMENT

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

El Paso Natural Gas Company. Docket No. RP72-6.

OPINION NO. 697

OPINION AND ORDER PRESCRIBING PERMANENT CURTAILMENT PLAN

(Issued June 14, 1974)

NASSIKAS, Chairman:

This proceeding is concerned with establishing a just and reasonable curtailment plan on the El Paso system. In reviewing the various decisions rendered by Presiding Administrative Law Judge Arthur Fribourg in this docket, principally the initial decision of June 5, 1973, we find that certain modifications are required as shall be hereinafter addressed.

Procedural Background

On July 6, 1971, El Paso Natural Gas Company (El Paso) tendered for filing proposed changes in its FPC Gas Tariff to provide new priorities of service on its Southern Division System in the event that shortage of gas supplies required the curtailment of gas deliveries to its customers.

By an order issued August 5, 1971, the Commission suspended the proposed tariff sheets until January 6, 1972, ordered a hearing on the matter and granted interventions. Hearings to determine the justness and reasonableness of the proposed curtailment plan commenced November 9, 1971, and continued intermittently until May 18, 1972. After the hearings on the permanent plan, but before briefing was completed, El Paso, on August 17, 1972, filed a motion requesting the Commission to issue an emergency order prescribing an interim curtailment plan for the period beginning November 1, 1972, until issuance of a final Commission order prescribing a permanent curtailment

plan for the period beginning November 1, 1972, until issuance of a final Commission order prescribing a permanent curtailment plan for El Paso.

In response to a motion filed on August 24, 1972, by Salt River Project Agricultural Improvement and Power District, the Commission, by an order issued September 1, 1972, authorized a limited reopening of the record for purposes of determining the need for an interim curtailment plan on El Paso's Southern Division System and the form such plan should take if found to be needed.

A hearing on the interim plan commenced September 12, 1972, and ended September 25, 1972. On October 2, 1972, the Commission granted El Paso's motion to omit the intermediate decision. On October 31, 1972, the Commission issued Opinion No. 634 prescribing an interim emergency curtailment plan for El Paso for the period November 1, 1972, through October 31, 1973, or until the date of a final Commission order, whichever came first. Opinion No. 634-A. "Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing", was issued on December 15, 1972.[1]

On August 18, 1972, the City of Willcox, Arizona, and Arizona Electric Cooperative (AEPCO) filed a motion for extraordinary relief requesting exemption from El Paso's curtailment plan on the ground that alternate fuel supplies were unavailable to AEPCO, thereby endangering the reliability of electric service to its customers. The motion was denied by the Commission in Opinion No. 634, but allowance was made for the

[1]On appeal, affirmed in part and reversed and remanded in part, *American Smelting and Refining Co., et al. v. F.P.C.*, ... F.2d ...., (D.C.Cir., January 21, 1974).

filing of a new petition at a later time if AEPCO could make a more persuasive showing. AEPCO filed an amended motion on November 30, 1972, followed by a hearing on January 30, 1973, and denial of the motion by Presiding Law Judge Fribourg in an initial decision issued March 19, 1973.

Meanwhile on December 15, 1972, the permanent curtailment plan was initially briefed to the Presiding Judge. Reply briefs were initially due to be filed on January 15, 1973, but were postponed after a motion by El Paso requesting that a conference of all the parties herein be held to discuss the impact on the instant proceeding of October No. 467, the Commission's policy statement issued on January 8, 1973, which set forth priorities of deliveries to be followed by jurisdictional pipelines during periods of curtailment. On February 6, 1973, the Presiding Judge ruled that Order No. 467 did not require a reopening of the record and that the briefing schedule should be resumed. The Presiding Judge did rule, however, that the impact of Order No. 467 was a relevant matter for consideration in the reply briefs and that a third brief limited solely to this issue was appropriate. Consequently, reply briefs were filed on March 16 and responses to issues raised by Order No. 467 were filed on March 30, 1973.

An initial decision on the permanent curtailment plan was rendered by Presiding Administrative Law Judge Fribourg on June 5, 1973. The record remained open pending resolution of two ancillary phases of the case, to wit, issues raised by the petition of the City of Mesa, Arizona, for extraordinary relief from the operation of the interim curtailment plan, and the issues raised by Arizona Public Service Company, *et al.*, as to the grouping of delivery point obligations for purposes of

the permanent curtailment plan. An initial decision on the petition for extraordinary relief by the City of Mesa, Arizona, was subsequently rendered on June 27, 1973, followed thereafter by an initial decision on the grouping of delivery points, on September 9, 1973.

By order of October 18, 1973, the Commission extended the operation of the interim curtailment plan pending further action of the Commission on the permanent curtailment plan. Applications for rehearing and reconsideration of the Commission's October 18, 1973 order extending operation of the interim plan were filed by Pacific Gas and Electric, Southern California Gas Company, San Diego Gas and Electric, the People of the State of California and the Public Utilities Commission of the State of California. An order granting rehearing for the purpose of reconsideration of the October 18, 1973 order was granted by Commission order of December 3, 1973.

By order of October 25, 1973, the Commission denied a joint petition for extraordinary relief filed by the Department of Water and Power of the City of Los Angeles and Southern California Edison. Applications for rehearing of the October 25, 1973 order filed by the petitioners and the State of California and the California Public Utilities Commission were denied by Commission order of December 20, 1973.

On January 21, 1974, the United States Court of Appeals for the District of Columbia Circuit in *American Smelting and Refining Company, et al. v. F.P.C.*, ...F.2d...., affirmed in part and reversed and remanded in part the interim curtailment plan for El Paso. The court permitted the interim plan to continue in effect for a reasonable period of time pending a decision

by the Commission regarding the matters remanded for further consideration. We had determined at the time of the Court's decision that a permanent plan for El Paso virtually identical to the interim plan would best serve the public interest, and were preparing to issue a final order to that effect. However, we could not issue a permanent plan so closely approximating the interim plan without resolving those aspects of the interim plane which the Court had found to be inadequate. We have therefore reconsidered the interim plan in light of the Court's remand and have made certain revisions to our permanent plan as a result thereof. We thus find it appropriate and expeditious to treat both phases of the proceeding in this opinion.

Priorities of Service

In Order No. 467-B in Docket No. R-469[2] the Commission expressed its preference for an order of nine curtailment priorities such that users who purchase gas under interruptible contracts are to be curtailed ahead of users who have contracted for firm service. However, certain factual conditions shown by this record to exist on the El Paso Southern Division System persuade us that the Commission's overriding policy of curtailment based on end-use would be contravened should the priority format of Order No. 467-B, and the "firm-interruptible" contract distinction embodied therein, be imposed on the El Paso system. In our judgment, the manner in which the regulatory policy of the State of California has influenced the development of contractual relationships on the El Paso Southern Division System requires this modification of our policies.

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[2]Order No. 467, Docket No. R-469, issued January 8, 1973, as amended by Order No. 467-A, January 15, 1973, as modified by Order No. 467-B, March 2, 1974.

Pursuant to regulations of the California Public Utilities Commission, all contracts of California industrial consumers whose daily requirements of natural gas exceed 200 Mcf are interruptible contracts. No such limitation on the capacity to contract for firm service exists with respect to the East-of-California (E-O-C) customers. Although the Presiding Judge failed to rule definitively on the nature of the E-O-C contracts, we find that with exception of certain sales for irrigation purposes, El Paso's E-O-C customers purchase under firm contracts.[3]

Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Arizona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served.

---

[3]The E-O-C contracts give no indication that El Paso is not expressly obligated to deliver certain volumes, nor can the E-O-C contracts be construed as anticipating or permitting interruption with virtually no notice nor construed as requiring alternate fuel capability. Compare definition of "interruptible service", Order No. 493, Docket No. R-474, issued September 21, 1973 (slip op. at 10).

In this context, application of the Order No. 467-B priorities would serve to exalt contract entitlements over end-use considerations, a result at variance with the intent of the Commission in its decision to incorporate the "firm-interruptible" distinction in its order of curtailment priorities. As we stated in Opinion No. 643, *Arkansas Louisiana Gas Company*, Docket No. RP71-122, 49 FPC ..... issued January 8, 1973:

> "interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or nonsubstitutable industrial service do not contract on an interruptible basis." (Slip op. at 17.)

The value of the "firm-interruptible" contract distinction as a curtailment standard is thus largely dependent upon the accuracy with which it reflects the intensity of a purchaser's need for gas. In California, however, an interruptible contract does not necessarily reflect this intensity of need but rather signifies that the purchaser has complied with the state utility regulations. Under these circumstances, the reliability of the "firm-interruptible" concept as an index of end-use is not easily demonstrated, particularly, as discussed, *supra*, in light of the disparity in treatment which would be afforded similar E-O-C and California customers if the concept were strictly applied.

A substantially similar conclusion was reached in the initial decision, as evidenced by the manner in which the Presiding Judge conditioned the actual operation of the priority categories set forth therein. Recognizing the inconsistency inherent in a priority format that would permit placement of Nevada Power in a

higher priority category than that afforded an electric generating facility in California,[4] the Presiding Judge ruled as follows:

> ". . . if a distributor has a firm contract with El Paso and sells on an interruptible contract for boiler fuel use, the second contract should be treated as firm for purposes of allocation of priorities." (Initial Decision, slip op. at 15.)

El Paso sells to only two California customers, Southern California Gas Company and Pacific Gas and Electric, both of whom are distributors buying under firm contracts. By looking only to the contract between El Paso and the distributor to establish priority classification, the initial decision thus renders all California boiler fuel contracts firm, thereby for all practical purposes eliminating the "firm-interruptible" contract distinction on the El Paso system. Although the Order No. 467-B priority format is retained in the initial decision, its presence serves only a cosmetic function.

While in agreement with the result reached by the Presiding Judge, we view the indirectness of his approach, which we perceive as an effort to preserve at least the *formal* observance of the Order No. 467-B priority format, as unnecessary. Docket No. R-469 policies allow for some flexibility of application:

> "Orders in Docket No. R-469 are not self-operative in pending cases. *Initial decisions, and Commission decisions, will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence.*" (Order No. 467-B, slip op. at 5.) (Emphasis supplied.)

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[4]Initial Decision, Docket No. RP72-6, issued June 5, 1973. (slip op. at 15.)

We believe modification of the Order No. 467-B priority categories are warranted by this record and shall therefore prescribe an order of priorities based solely on end-use without regard to the firm or interruptible nature of the service rendered. The priority format so prescribed will therefore be virtually identical to that of the interim curtailment plan for El Paso set forth in Opinion No. 634.[5]

Our departure here from the Order No. 467-B curtailment categories should not permit the inference that the Commission is abandoning its position that interruptible uses should be subject to curtailment ahead of all other uses. Rather, we are here recognizing that an unbending commitment to the "firm-interruptible" contract distinction on the El Paso system would substantially compromise our fundamental objective of curtailment based on end-use. Moreover, we are not unmindful that the interim plan for El Paso has functioned without a showing of grievous hardship upon any party, a fact which further reinforces our belief that the action taken herein is in the best interest of gas consumers on the El Paso system.

Priorities

In light of the foregoing, the following priority of service categories shall be used during periods of curtailed deliveries on El Paso's Southern Division System:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day).

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[5]Opinion No. 634, *El Paso Natural Gas Company*, Docket No. RP72-6, 48 FPC 931, issued October 31, 1972.

Priority 2. Large commercial requirements (50 Mcf or more on a peak day), industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

The priorities listed above are found to be a just and reasonable classification of markets served directly and indirectly by El Paso. This classification and order of priorities are necessary to provide a uniform identification of end uses upon which to implement natural gas curtailment. Although many variations of classifications and priorities have been urged by the parties, we believe that those specified herein represent a workable, equitable solution to a fundamentally complex problem.

We find residential and small commercial use as the highest priority requirement for natural gas during periods of curtailed deliveries. Residential and small commercial consumers must occupy the top priority because of the magnitude of the problems associated with conversions to alternate fuels by these consumers and because interruption of such service involves very real safety risks which cannot be accepted. The safety

risks relate to the inherently dangerous nature of natural gas and logistical problems associated with daily curtailment of large numbers of small volume consumers. Each consumer would require manual turn-off and turn-on service which can be safely performed only by a trained technician. In this respect, the circumstance of loss of service to residential and small commercial consumers is not analogous to loss of residential and small commercial electric power service.

In both Order No. 467-B and in the interim plan for El Paso we found that residential and small commercial use of 50 Mcf or less on a peak day should serve as the demarcation line for Priority 1. The Presiding Law Judge determined that the record did not support a 50 Mcf cut-off point for the permanent plan, but found that a basis did exist for expanding Priority 1 to include small commercial requirements not exceeding 200 Mcf per day. In making this finding, he relied principally upon testimony of Southern Union witness Haseltine, who testified in pertinent part as follows:

> "Our own particular classification of customers, which incidentally includes more than the three categories envisaged by El Paso's filing, classifies some customers as 'industrial' who for all practical purposes will be such small users of gas that it is an extremely difficult problem logistically and a rather meaningless exercise to curtail them." (Tr. 7079)

Witness Haseltine further testified:

> "A suggested level of cut-off might be in the 200 Mcf per day range. I think anything below that level as a practical matter represents virtually a

> noncurtailable load and certainly should not be classified in a priority group that would require them to be curtailed with the initiation of the first stages of curtailment." (Tr. 7080)

On the basis of this testimony, for which cross-examination was waived, the Presiding Judge concluded, at least as to commercial loads, that a 200 Mcf peak day cut-off point would be appropriate.

In our view, the Haseltine testimony at most indicates (1) that certain industrial customers of Southern Union use small quantities of natural gas, and, (2) that in the context of the distribution system about which Mr. Haseltine is most qualified to testify, namely, Southern Union, it is his view that any load below 200 Mcf per day is, as a practical matter, noncurtailable.

Further, we note that the Administrative Law Judge apparently chose to disregard evidence that the use of a 50 Mcf cut-off point would shift to Priority 1 more than 99.7% of PG&E's total class of 145,001 commercial customers. (Tr. 8197) It appears from this evidence that, at least with respect to the PG&E system, the curtailment of commercial customers whose requirements exceed 50 Mcf on a peak day does not pose an unmanageable logistical problem.

In view of the foregoing, serious questions arise as to the propriety of imposing a 200 Mcf cut-off point for all Priority 1 customers on the El Paso system. As discussed, *supra*, we have announced in Order No. 467-B that our decisions in curtailment cases "will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence." (Order No. 467-B, slip op. at 5.) We are unable to find from the evidence in this

record that deviation from the 50 Mcf cut-off point for Priority 1 customers as established in Order No. 467-B and implemented in the interim plan for El Paso is required for the permanent curtailment plan. Accordingly, the 200 Mcf cut-off point for Priority 1 customers, as found by the Presiding Judge, is reversed.

Priority 2 should be maintained as originally established in the interim plan with the exception that requirements for pipeline customers' storage injections should be added thereto. Commercial requirements of over 50 Mcf per day, and industrial requirements for plant protection, feedstock and process needs are all found to be relatively high priority uses of natural gas for which substitute fuels are technologically infeasible as in the situation of process needs, or where curtailment would unduly jeopardize human health or property as in the case of plant protection, or where the natural gas is used as a feedstock for its chemical properties rather than as a fuel. Large commercial requirements are found to be relatively high priority uses on the basis that the applications are usually for space heating, are much smaller volume on the average than industrial consumers, and as such represent higher costs of conversion per unit of natural gas displaced. Furthermore, complete curtailment of commercial consumers, many of which provide essential public services, can result in comparatively severe human health and property damage hardship circumstances when alternate fuel facilities are not provided or alternate fuels are not available. For these reasons, requirements for large commercial uses should be equated with the highest industrial priorities during periods of natural gas curtailment.

Natural gas used for injection into storage should also be accorded a relatively high priority as the primary purpose of storage is the protection of service to residential and other temperature-sensitive consumers during the winter heating season. Several parties urged that market requirements should be adjusted to reflect operation of storage, including volumes delivered from storage. We find that the volumes injected into storage should be treated in the same manner as any other end use of natural gas includable within Priority 2. However, the injection volumes should reflect a netting of storage withdrawals for any particular period in order to determine the appropriate volume includable within Priority 2 as storage injection requirements. This is necessary since storage serves as a source of consumption during injection, and as a source of supply with respect to volumes withdrawn. Injections should be computed on a net basis, that is, withdrawals should be subtracted out, to avoid confusing the two realistically large injection volumes which we find would be inconsistent with the purpose of providing a high priority for these uses.

The record shows that substantial evidence was introduced regarding the treatment of withdrawals from storage in computing curtailment which related both to the interim plan and the permanent plan. As we indicated in Opinion No. 634, with respect to the establishment of the interim plan, the storage withdrawal adjustment proposed by Staff added additional complications and was therefore eliminated. In this respect, there was criticism of the Staff formula because of indications that certain customers of El Paso with storage facilities (1) would not sustain any curtailment, (2) could receive deliveries in excess of their con-

tract demand, and (3) could totally indemnify themselves from curtailment by expanding storage withdrawal capabilities. As we found this criticism to be unresolvable by reference to the record made in the interim proceeding, we chose to eliminate that provision. Further, inasmuch as the interim plan was to be effective only for the winter period 1972-73, and inasmuch as the summer storage injection season had passed at the time of the issuance of the interim plan in October 1972, we anticipated that the storage injection issue could be timely addressed in the proceedings on the permanent plan.

In our subsequent examination of this issue in the permanent plan, we have found that the record contains widely divergent views. The Presiding Law Judge concluded that injections and withdrawals should be ignored. Certain parties with large storage facilities argue that withdrawals should not be used in any manner which would result in additional curtailment. Others allege that withdrawals are used as part of winter period supplies, and cannot be physically segregated from natural gas supplied by other means, therefore making the contention that winter storage withdrawals should be used to determine the proper share of El Paso's deliveries to its customer's markets. We agree with the view that storage withdrawals cannot be physically separated from other gas supplies and therefore contribute proportionately to all sales made from a system at the time that it is receiving withdrawal volumes.

It then follows that net storage withdrawals contribute on a proportionate basis to all *end-uses* being served contemporaneously by a given system. We thus conclude that net storage withdrawals should be treated

as a customer's independent source of supply in computing El Paso's share of such customer's requirements for a particular period. We further find that the record in this proceeding does not support the contention that treatment of storage withdrawals as a source of supply will discourage future development of gas storage facilities.

Priority 3 shall be the catch-all category for unspecified industrial requirements and as such represents a large group of generally smaller volume industrial uses of all types. On a unit of gas displacement basis, conversion to other fuels for these uses is more costly than in the case of larger volume uses. Gradation of the uses in this priority category by volume is not practicable in view of the number and variety of industrial applications represented.

Our assignment of boiler fuel usage to the lowest priority categories in the interim plan was remanded by the United States Court of Appeals for the District of Columbia Circuit in its January 21, 1974 decision in *American Smelting and Refining Company, et al. v. F.P.C.*, ... F.2d ....., for lack of specific supportive findings and reasoning. It is therefore necessary to state here that our decision in Opinion Nos. 634 and 634-A to subordinate boiler fuel to the lowest curtailment priorities was based on the same findings and reasoning which, as set forth hereinafter, compel a like subordination of boiler fuel in the permanent plan.

For purposes of both the interim and permanent plans, the evidence indicated that alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications. Secondly, the evidence demonstrated that the increase in air pollution

resulting from the use of alternate fuels could be more efficiently and economically controlled through the deployment of pollution abatement equipment by boiler fuel users because of the large size of individual installations. Third, by curtailing large volume boiler fuel users ahead of other industrial users the evidence showed that gas displacement could be maximized with a minimum of economic disruption and dislocation.

In establishing priorities as between boiler fuel users, we find, consistent with the above, that largest users should be curtailed first. The volumetric cut-off points specified in Priorities 4 and 5 represent a modification of a four-category ranking of boilers based on size suggested by Johns-Mansville witness Markus (Tr. 8298-8299). However, in the interest of orderly administration of both plans, we found it unnecessary to assign additional categories for boiler fuel use below 1500 Mcf per day or above 15,000 Mcf per day. We recognize that any number of gradations related to size may have been possible, however, in our judgment, the cut-off points established in Priorities 4 and 5 will result in the very largest boilers being curtailed first, with, correspondingly, the maximum initial displacement of natural gas.

The interim curtailment plan contained language in priorities 4 and 5 which defined requirements for boiler fuel use, "where existing alternate fuel capability is present." We stated in Opinion No. 634, "In so doing we are not requiring the installation of dual fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation of alternate fuel capacities." (Mimeo page 6)

We find that circumstances regarding conversion to alternative fuels under which the interim plan was devised are no longer applicable.

Our intent as expressed in the interim plan to confine curtailment to situations where alternate fuel capability already existed is not viable long-term policy in light of El Paso's shortfall and the current nationwide natural gas shortage. We find that the public interest requires that every effort be made to convert equipment so that alternate fuels may be used where feasible.

We, therefore, provide that priorities 4 and 5 contain the terms, "where alternate fuel capabilities can meet such requirements."

Administration of Plan

The initial decision did not provide for excess gas takes. We find that the public interest requires unauthorized overrun penalties to insure compliance with the curtailment priorities established herein. For purposes of determining penalties an unauthorized overrun shall be those volumes taken by a customer which exceed the volumes available to it from El Paso by operation of this curtailment plan.

However, excess volumes which are taken to maintain the integrity of a customer's requirements in Priority 1 and Priority 2 shall not be deemed unauthorized overrun volumes for purposes of assessing penalties. In order to qualify for this exemption from penalty, a customer must be able to demonstrate that with the exception of deliveries made in satisfaction of Priority 1 and Priority 2 requirements, no deliveries were made in any other category during the period in which the ex-

cess volumes were taken. The exemption from penalty for Priority 1 and 2 uses is not to be construed as providing opportunity for El Paso's customers to abuse the exemption by permitting growth in these Priorities which would have the effect of increasing deliveries to those customers beyond the monthly base volumes established by this curtailment plan.

The record demonstrates that the levels of overrun penalties proposed by El Paso in the proceedings[6] are appropriate in light of the supply situation and the price of alternate fuels reflected therein. In the event that these overrun charge levels are found to be too low in the future, El Paso has adequate remedies under Section 4 of the Natural Gas Act. We shall require El Paso to file tariff sheets consistent with our findings hereinabove on penalties.

As indicated in Opinion No. 634-A, we prevented El Paso from implementing penalties during the interim program. We hesitated to permit El Paso to do so on the basis of the uncertainties surrounding the proposal regarding El Paso's actual needs for instituting penalties. The Commission felt then as it does now, that it has the authority to order a jurisdictional pipeline to in-

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[6]Original Sheet No. 67-E, FPC Gas Tariff, Original Vol. No. 1, Section 20.4

(a) For that part of the unauthorized overrun volume up to 3% of Buyer's entitlement for such day, an amount equal to that due under the applicable rate schedule.

(b) For that part of the unauthorized overrun volume which is in excess of 4% of Buyer's entitlement for such day, up to 5% of Buyer's entitlement for such day, an amount of $2.50 per Mcf.

(c) For that part of the unauthorized overrun volume which is in excess of 5% of Buyer's entitlement for such day, an amount of $5.00 per Mcf.

stall facilities when needed to physically limit deliveries to customers who violate curtailment orders.[7]

However, at the time the question was presented on the interim plan, neither El Paso nor its customers had any experience in natural gas curtailment. In fact, the E-O-C customers had no experience whatever in limiting their takes from El Paso. The impact of the penalty provision could not, in our judgment, be assessed at that time.

The initial decision provided for customers to furnish El Paso with end-use data every 30 days (p. 30). We agree with those parties who request an extension to 60 days in which they are required to furnish such data to El Paso.

The initial decision does not provide an adjustment on behalf of the partial requirements customers which would offset reduced deliveries to such customers from their other supply sources, although it has been urged on exceptions that the Administrative Law Judge erred in failing to provide such an adjustment. In Opinion 647, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120, ... FPC ...., issued January 12, 1973, we said:

> "In approving this curtailment plan for United as it affects partial requirements customers, we shall allocate the impact of curtailment equally, insofar as may be possible, upon full and partial requirements customers treating both in the same manner." (Slip op. at 14).

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[7]See *Order Authorizing and Directing Interim Enforcement of Curtailment Program Pending Final Determination of Issues*, issued July 2, 1971, in *United Gas Pipe Line Company*, Docket Nos. RP71-29, and RP71-120.

We did indicate in that opinion, however, that modification of our treatment of partial requirements customers might be necessary to protect small volume residential service in the event of extraordinarily severe shortages requiring curtailment in the highest priority categories. (Opinion No. 647, Slip op. at 14). In reviewing the record in the instant proceeding, we find no indication that the reduced supplies available to the California partial requirements customers from sources other than El Paso, in combination with a curtailment of entitlements from El Paso prorated equally throughout the Southern Division syystem, will result in a shortage of such severity as to warrant special treatment for the partial requirements customers.

The record shows that deliveries to California by Transwestern Pipeline Company and Pacific Gas Transmission Company, its other interstate pipeline suppliers, were not curtailed at the time the record was compiled in this proceeding[8] (Ex. 53; Ex. 105). The evidence also indicates that California source gas supplies equaled approximately 8% of the total requirements of the Southern California companies in 1971, with the remaining 92% being supplied by interstate pipelines including El Paso (Ex. 105).

The witness for the Pacific Lighting Utilities serving Southern California testified that the level of service to firm consumers, including industrials, has been 100% for all years 1967 through 1972, but that deliveries to interruptible consumers have been declining since 1970. He further stated that there has been a substantial decline in the level of service for interruptible

[8]Since then Transwestern's deliveries have been curtailed slightly, but PGT has been able to maintain its full deliveries without curtailment.

consumers which will continue even with delivery of the full El Paso contract quantity (Tr. 7243).

Since interstate deliveries from all sources have not been curtailed during these years, this decline in service can be attributed to two factors only. One, that the California source supplies are declining, which is a fact of record, and (2) that the gross industrial market for natural gas in Southern California has been growing, which is also a fact of record (Ex. 105). Solutions to both of these causal factors are clearly outside the scope of the Commission's jurisdiction.

Given the current natural gas supply-demand imbalance in Southern California, the question then arises as to whether ratable curtailment by El Paso of industrial requirements within the same end-use priority on a systemwide basis is proper, or whether Southern California should be granted preferential treatment in light of its current imbalance. We find the evidence necessary to support a preference lacking.

One significant and highly variable factor controls the ability of industrial consumers exposed to natural gas curtailment to continue their operations, to wit, their ability to use and secure alternate fuels. There is no evidence in this record that industrial consumers in California are in a worse position with respect to their ability to use or to secure alternate fuels than consumers located E-O-C. In the absence of a positive showing regarding relative deficiencies in alternate fuel availability, we find that curtailment should be implemented to all customers without undue preference or discrimination.

We reject a policy, without compelling evidence to the contrary, which would effectuate greater curtail-

ment to E-O-C consumers in order to provide increased deliveries to the California markets because of either declining local supplies or growth in new industrial demands. Therefore, in our view, the decision of the Administrative Law Judge to treat full and partial requirements customers in the same manner was correct and is consistent with both our holding in the *United* case, *supra,* and the evidence herein. We therefore affirm the initial decision which provides for *pro rata* curtailment in each end-use category in proportion to the percentage of total gas supply from El Paso. Further, we do not believe that new supplemental gas supplies should receive any special recognition under the partial requirements formula, i.e. they should not be eliminated in determining a customer's entitlements during curtailment. However, with respect to the latter, any customer may file for reconsideration of the partial requirements formula when and if an incremental supply becomes available. As staff properly noted (Exceptions at 29-30), requirements should be equated to historical usage, and the total use from all sources in a given priority during the base period, including storage withdrawals, should form the coefficient to determine partial requirement customers' allocations.

The Administrative Law Judge (Initial Decision at 30-31) established a monthly base period to which periodic revisions would be made so as to encourage sales to higher priorities, and used historical deliveries for the 12 months ending June 30, 1973. This finding is essentially a policy decision which is unsupported by the record. In our view, monthly base volumes should closely approximate historical usage, and thus should be based upon the 12 months ending October 31, 1972 (the period immediately preceding the interim

emergency curtailment plan in Opinion No. 634).[9] We do, however, stand ready to consider revision to these base volumes at a later date and in a future proceeding upon a determination by us that such revision would be in the public interest.

Although we disagree with the "moving base period" approach adopted by the Presiding Law Judge, we do concur with his finding that annual volumetric limitations should be based on historical use rather than contract limitations. In this respect, the Presiding Law Judge observed, and we agree, that:

> On this record, the calculation of deliveries to users in a priority that is to suffer partial curtailment should be based on historical use rather than on contract limitations. As to California, one basis is substantially the same as the other because takes have been substantially at maximum contract levels. The E-O-C customers, meaning both the distributors and direct-sale customers, have had their requirements served 100%, but the contracts have not regularly been changed as the requirements changed. To base curtailment on contract limitations would therefore produce unrealistic and inconsistent results. To base curtailments on actual use makes unnecessary many petitions for extraordinary relief which would otherwise be filed.

This view of the record formed the basis of our decision in Opinion No. 634-A to impose annual limitations, based on actual takes, on the entitlements of the full requirements customers while basing the entitlements of partial requirements customers on contract en-

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[9]Compare Opinion No. 647 at para. 26.

titlements. However, as we failed to set forth in detail our reasoning therefor, it appeared to the reviewing court that our action may have been discriminatory.[10] However, as noted by the Presiding Law Judge, *supra,* the treatment of these two groups with respect to derivation of base volumes is identical, since the contract entitlements for the partial requirements customers coincided with their historical takes.

El Paso should continue to grant emergency relief by special exemption from curtailment in order to protect electric reliability and to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property. The observations of the Presiding Judge at page 33 of his decision regarding the propriety of this delegation are herein reversed.[11]

Environmental Issues

In our order issued August 22, 1972, we denied a motion by Air Pollution Control District of the County of Los Angeles requesting termination of the instant proceeding and preparation and circulation by Commission staff of a detailed environmental impact statement.[12] In denying the motion, however, we nevertheless authorized the presentation of environmental evidence by any party so desiring and required that the

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[10]See *American Smelting and Refining Company, et al. v. F.P.C.,* .... F.2d. ...., D. C. Cir., January 21, 1974, (Slip. Op. at 43-45).

[11]*Cf.* Order No. 467-A, Amendment to Statement of Policy issued January 15, 1973, in Docket No. R-469.

[12]Order Denying Motion to Terminate Proceeding and to Require Staff to Prepare and Circulate Environmental Impact Statement, Docket No. RP72-6, August 22, 1972, 48 FPC 371.

process of analysis of environmental issues be embodied in the initial decision. Evidence was received on existing ambient air quality, federal, state and local air pollution regulations, meteorological conditions and possible economic consequences of gas reduction in each of the areas on El Paso's system that would be affected by curtailment.

In his review of the environmental evidence, the Presiding Judge concurred with staff's contention that on the basis of the factual record herein "any attempt to quantify the environmental impact on the El Paso service area would be abortive."[13] It is noted, however, that the concurrence of the Presiding Judge was given with no small measure of reluctance, for it is apparent from the initial decision that he does not share the Commission's view of the relationship of the National Environmental Policy Act (NEPA)[14] to curtailment proceedings. The Presiding Judge indicates that in his view a more complete record could have been developed with respect to environmental issues had we granted the motion of the Los Angeles County Air Pollution Control District and had we not reversed his order of January 27, 1972, directing staff to present an environmental impact case. He makes reference to studies conducted by certain FPC personnel, suggesting that similar studies might have been "of interest" in the instant proceeding.

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[13]Initial Decision, Docket No. RP72-6, June 5, 1973 (Slip op. at 8).

[14]National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

However, irrespective of the degree to which the record might have been illumined by a staff presentation on the issue of environmental impact, the other parties herein, representing a broad range of interests and viewpoints, were afforded the opportunity to present environmental impact evidence. The environmental record resulting from their efforts, as begrudgingly acknowledged by the Presiding Judge, "gives no reason to suppose that environmental considerations in the area served by El Paso gas, viewed from an overall standpoint, can be so quantified as to produce usable results."

The Presiding Judge therefore accepted staff's conclusions as to environment in every particular, as does this Commission. He expresses the view, however, that the record did not permit him to rule otherwise in light of the absence of any evidence from an "expert capable of viewing the entire El Paso situation as a witness devoted to the broadest public interest." We cannot accept this conclusion for two reasons. First, the Commission, in terms of both expertise and devotion to the public interest, is qualified to provide the perspective which the Presiding Judge feels is lacking in this record. Second, the Commission's position on the environmental impact issue was set out in detail in our order of August 22, 1972, and is a part of the evidentiary record herein.[15]

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[15] *Cf.* Order No. 415-C, issued December 18, 1972, in Docket No. R-398.

The Presiding Judge also implies that a full record may not have been developed herein as a result of the absence of an environmental statement by the staff. As previously stated, our Order of August 22, 1972, in this docket, sets forth the reasons which, in our judgment, preclude the presentation of a staff environmental impact statement in curtailment cases. We there determined:

> In proceedings involving the justness and reasonableness of proposed curtailment plans, the pipeline company cannot supply an analysis of the potential impact its plan will have on the quality of the human environment. Nor can this Commission.[16]

Our determination was reached through the exercise of "the knowledge and experience of this Commission gained through years of intimate association with the transmission and distribution functions of the gas industry."[17] The expertise so gained, when brought to bear on the question of the environmental impact of curtailment, required the conclusion that:

> The environmental impact of the implementation of a curtailment plan depends upon such variables as the degree of curtailment, the length of curtailment, atmospheric conditions during the time of curtailment, the locality where curtailment is implemented, and the end uses of the gas flowing through the pipeline system. Each of these variables can change without any dependence one upon the other, none can be known and measured in advance, and the environmental effects of all possible

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[16] 48 FPC at 373.

[17] *Ibid.*

> combinations of the variables would be mathematically impossible to compute, much less identify and measure.[18]

A review of the record in this proceeding provides us with no basis for reaching a different conclusion. Nevertheless, the Presiding Judge also invited the attention of the Commission to language in the recent court ruling in *Alabama Gas Corp. v. F.P.C.*, 476 F. 2d 142, No. 72-1475, 5th Cir. February 7, 1973, as support for the belief of the Presiding Judge that the preparation of a staff environmental impact statement in accordance with NEPA's Section 102(2)(C) procedural requirements was obligatory in this proceeding.

As our order of August 22, 1972, thoroughly addressed the issue of the inapplicability of Section 102 (2)(C) procedures in curtailment cases, we shall herein incorporate by reference and *in toto* the views expressed in that order.[19]

The language to which the Presiding Judge refers in the *Alabama Gas Corporation* decision is as follows:

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See *Calvert Cliffs Co-ord Com. v. United States Atomic Energy Com'n.*, D.C. Cir., 1971, 449 F.2d 1109, 1114-15. As there noted, the legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.

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[18] *Ibid.*

[19] *Cf. Arizona Public Service Co. v. F.P.C.*, 483 F.2d., 1275, 1282, (D.C. Cir. 1973).

We stated in the August 22, 1972 order that our review of court decisions did not lead us to the conclusion that the courts expect agencies to exalt form over substance in applying the mandates of NEPA.[20] We likewise do not believe that the legislative branch intended to require compliance in cases where, as here, the only result of compliance would be the preparation of an impact statement devoid of meaningful content.

We do not arrive at this judgment, however, in an attempt to shirk the responsibilities imposed on this Commission by NEPA. See *Scientist's Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, (D.C. Cir., 1973). It derives from our knowledge that the degree of speculation necessitated by such a prediction of future impact would, for the reasons expressed in our order of August 22, 1972, far exceed the standard of "reasonable forecasting and speculation" found in the *Scientist's Institute for Public Information* decision, *supra*, to be implicit in NEPA. In the *Scientist's Institute for Public Information* case, the court cited the "rule of reason" to be followed in determining whether an agency action has met NEPA requirements:

> 'The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *.' (Footnotes omitted.)[21]

The Commission has determined in its order of August 22, 1972, that compliance with NEPA Section 102(2)(C) procedural requirements in curtailment cases is "not meaningfully possible", a determination further corroborated by the evidence in this proceeding.

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[20]48 FPC at 376.

[21]481 F.2d 1079, 1092.

Initial Decision on Application of City of Willcox and Arizona Electric Cooperative for Extraordinary Relief

The City of Willcox, Arizona and Arizona Electric Cooperative (AEPCO) contend that two issues are raised by their joint amended motion for extraordinary relief:

(1) Whether AEPCO's entire industrial load should be reclassified to a higher priority than provided under the interim curtailment plan; or, in the alternative,

(2) Whether AEPCO should be exempted from curtailment during the interim period.

The Presiding Judge correctly ruled that the issue of reclassification is directed to the merits of the curtailment plan adopted in Opinions No. 634 and 634-A, and therefore goes beyond the scope of the proceeding on the application for extraordinary relief authorized by our order issued in this docket on January 11, 1973. The hearing was ordered for the limited purpose of determining the capability of AEPCO to operate reliably and safely on fuel oil for sustained periods.

With respect to this limited issue, we find that the applicants failed to sustain the heavy burden of proving, on the basis of all factors, that an exception to the curtailment program is in the public interest.[22] The record indicates that AEPCO has been able to operate on fuel oil for extended periods. The record also supports the conclusion of the Presiding Judge that the risk of a boiler explosion occasioned by the use of fuel oil has been overstated. The attempt by the applicants

[22]Order issued January 9, 1973, *United Gas Pipe Line Company*, Docket Nos. RP71-29, RP71-120 (mimeo. at 4).

to demonstrate the imminence of the dangers attending the use of fuel oil under the AEPCO boiler is not aided by the admitted disinclination of the AEPCO management to install flame safety equipment. As stated by the Presiding Judge, "one can hardly believe that it [AEPCO] is deliberately risking its plant and that it now comes in asking to be protected from its own foolhardiness."[23]

The initial decision of the Presiding Judge issued March 19, 1973, denying the joint amended motion for extraordinary relief, is therefore affirmed in full.

Initial Decision on Application of City of Mesa for Extraordinary Relief

The City of Mesa, Arizona, has asked for extraordinary relief from the operation of the interim curtailment plan for El Paso as prescribed in Commission Opinions 634 and 634-A. Mesa's concern arises from the excess of its actual peak load over its contract quantity, because of the Commission's ruling in Opinion No. 634-A that the lesser of these two must limit the measurement of deliveries during times of curtailment.

In the initial decision on this issue, rendered June 27, 1973, the Presiding Judge denied Mesa's application as unnecessary on the grounds that Mesa's Priorities 1 and 2 customers are adequately protected by the provisions of El Paso's tariff which requires satisfaction of Priorities 1 and 2 requirements notwithstanding contract limitations. He further found that Mesa's Priority 3 customers cannot be curtailed, pursuant to

[23]Initial Decision on Application for Extraordinary Relief, Docket No. RP72-6, issued March 19, 1973 (mimeo. at 4).

Commission direction, until customers in subordinate priorities have been curtailed 100 percent. The Presiding Judge therefore stated:

> The first two priorities are protected as Mesa wishes, and the third to the same extent as is the case with any other customer. Equity requires no more. (Initial decision, June 27, 1973, slip op. at 4.)

We find no error in the ruling of the Presiding Judge on this issue. We note further that insofar as the permanent plan adopted here provides for calculation of curtailment requirements on the basis of historical use rather than on the basis of contract limitations, such petitions for extraordinary relief as here filed by Mesa should prove unnecessary under the permanent plan.

Decision of Administrative Law Judge on Grouping of Delivery Points

In Opinion No. 634-A, issued December 15, 1972, we ordered El Paso to eliminate from its interim curtailment plan the provision for grouping of individual delivery points. We said with respect thereto that such grouping ". . . could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point." (Slip op. at 4).

In our order of February 7, 1973,[24] in response to Southern Union's application for rehearing, or in the alternative, petition for special relief, we reiterated our

[24]Order on Protests, Motions for Clarification, Applications for Rehearing of Interim Curtailment Plan.

view that grouping should be eliminated from the interim plan but invited the presentation of evidence as to the propriety of grouping in the permanent plan.[25] Subsequently, Southern Union Gas Company (Southern Union), Arizona Public Service Company (APS) and Southwest Gas Corporation (Southwest Gas) filed an application for a limited reopening of the record on the permanent curtailment to present evidence on the grouping issue, culminating in a hearing on June 14, 1973, and the issuance of an initial decision on September 19, 1973, by Administrative Law Judge Fribourg wherein the grouping of delivery points was approved for El Paso's permanent curtailment plan.

The United States Court of Appeals for the District of Columbia Circuit, on January 21, 1974, issued a decision on the interim plan for El Paso in *American Smelting and Refining, et al. v. F.P.C.*, ... F.2d ..... The court ruled, *inter alia*, that our elimination of the grouping of delivery points from the interim plan was not sustained by substantial evidence that such grouping would be discriminatory. The court therefore reversed our findings with respect to grouping in Opinion 634-A, and remanded the issue to us for further fact finding.

Our concern that the practice of grouping of delivery points may be discriminatory with respect to single delivery point customers remains undiminished, notwithstanding the initial decision of September 19, 1973, and the action of the court in *American Smelting and Refining, supra*. Although the Presiding Judge found in the September 19, 1973 initial decision in the reopened proceeding that grouping should be permitted

[25] *Id.*, Slip op. at 6.

on the El Paso system, we are unable to sustain his finding in view of the inconclusive nature of the evidence presented.

The record does not clearly reflect the volumes which would be available to multiple delivery point customers by the use of grouping as compared to the volumes available to such customers if grouping is not permitted. In our view, the question of possible discrimination cannot be adequately addressed absent this determination of the actual quantity of gas involved. The Presiding Judge endeavored to elicit this information in the course of the hearing. However, in apparent reliance on the following statement by counsel for Southern Union, little effort was thereafter devoted by the Presiding Judge to the clarification of the record on this point:

> "MR. HAGGERTY: Your Honor, as we began to prepare our evidence in this case we attempted to address that problem. What we ran up against was the problem that you have to develop such an elaborate set of assumptions in order to reach any finite volume, that we could not even begin to give a definitive number that we are talking about." (Tr. 8814)

We are reluctant to conclude that the distributors here involved are incapable, in terms of either operating expertise or technical resources, of determining the total volume of gas upon which this grouping controversy centers. Further, we find the record to be deficient with respect to the actual manner in which volumes would be shifted among customers if grouping is permitted. We cannot say that no discrimination will occur as between the market areas served in the absence of information regarding how and when volumes are shifted.

Additionally, it is asserted that grouping will aid the resolution of supplemental supply problems, inasmuch as a single central peak-shaving facility could be utilized which would preclude the need for a number of small peak-shaving facilities at individual service areas. However, the evidence does not reveal those specific service areas which might require peak-shaving facilities if grouping were prohibited, nor does the evidence show that the manner in which a central facility would operate would necessarily benefit customers in remote service areas.

In brief, we find the evidence on the reopened record does not permit an informed decision as to whether grouping should be permitted in El Paso's permanent curtailment plan. We therefore remand that issue to the Presiding Judge for additional evidence concerning those matters which we raise herein.

Insofar as the state of the record at this time does not permit us to find on the basis of substantial evidence that the grouping of delivery points on the El Paso system is discriminatory, we hereby set aside that portion of Opinion No. 634-A which prohibited the use of grouping for the interim curtailment plan. Grouping shall thus be permitted on the El Paso system commencing as of the date of this opinion until such time as the evidence developed in the remanded proceeding may otherwise require.

The Commission further finds:

(1) El Paso's interim curtailment plan in Docket No. RP72-6, as prescribed in Opinion Nos. 634 and 634-A, and as extended by our order of October 18, 1973, except as modified herein by the elimination from Opinion No. 634-A of the prohibition of group-

ing of delivery points, is just and reasonable for the period ending as of the effective date of this opinion.

(2) El Paso should revise its permanent plan to provide for the priorities of service in times of curtailment as set forth in this opinion and order and such a permanent plan is just and reasonable.

(3) The Initial Decisions of March 19, 1973, June 5, 1973, and June 27, 1973, are affirmed, to the extent consistent with this opinion and order, and all exceptions, not herein granted, should be denied.

(4) The Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(5) In view of the decision herein, all applications for rehearing and reconsideration of the Commission's order of October 18, 1973 extending the interim curtailment plan for El Paso, as granted by our order of December 3, 1973, are rendered moot.

(6) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March 14, 1974, requesting modification of the interim curtailment plan is denied.

(7) The revised tariff sheets to be filed by El Paso should reflect the definitions contained in Order No. 493-A, issued October 29, 1973.

The Commission orders:

(A) El Paso shall continue such curtailments as are necessary in accordance with the interim curtailment plan prescribed in Opinion Nos. 634 and 634-A

and modified in finding paragraph (1) hereof, pending further Commission action on the tariff sheets to be filed in (B).

(B) El Paso shall file revised tariff sheets, within 30 days after this opinion and order, consistent with the terms and conditions prescribed herein.

(C) The Administrative Law Judge's Initial Decision of March 19, 1973, is adopted as part of this opinion, and exceptions, not granted, are denied.

(D) The Administrative Law Judge's Initial Decision of June 5, 1973, to the extent not inconsistent herewith is adopted as part of this opinion, and exceptions, not granted, are denied.

(E) The Administrative Law Judge's Initial Decision of June 27, 1973, is adopted as part of this opinion, and exceptions are denied.

(F) The Administrative Law Judge's Initial Decision of September 19, 1973, is reversed and remanded to the Presiding Administrative Law Judge to adduce additional evidence on those matters raised herein pertaining to the propriety of the grouping of delivery points in the permanent curtailment plan.

(G) All applications for rehearing and reconsideration of the Commission's order of October 18, 1973, extending the interim curtailment plan for El Paso, as granted by our order of December 3, 1973, are rendered moot by our decision herein.

(H) The joint motion by the City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc., filed March 14, 1974, requesting modification of the interim curtailment plan is denied.

(I) This opinion and order shall become effective within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later.

By the Commission. Commissioner Moody, dissenting, filed a separate statement appended hereto.

Commissioner Smith, dissenting in part, filed a separate statement appended hereto.

Kenneth F. Plumb,
Secretary

[Seal]

El Paso Natural Gas Company. Docket No. RP72-6. (Issued June 14, 1974).

MOODY, Commissioner, *dissenting:*

I.

Noncompliance with Section 102(2)(c) of NEPA[1] is premised upon the view that "preparation of an impact statement [would be] devoid of meaningful content." (Order, p. 21.) This is essentially the same position taken by the Commission in its August 22, 1972, order in this docket,[2] wherein we declined to order Staff preparation of an impact statement.

No matter how logical this position,[3] it has been rejected by the Courts—directly rejected in this case,[4] and inferentially rejected by the Fifth Circuit.[5] I take it that only where Section 102(2)(c) compliance gives rise to a violation of statutory duty is compliance excused;[6] such a situation is not here present. We

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[1]42 USC 4321, *et seq.*

[2]48 FPC at 376.

[3]At the time of issuance of the August 22, 1972, order, I shared the belief of my colleagues that application of a rule of reason permitted noncompliance with Section 102(2)(c) in curtailment cases; I believed then, and still believe, that any impact statement in a curtailment case will be filled with speculation and conjecture because of the multiple unpredictable variables involved.

[4]The August 22 order was before the Court in connection with the appeal of our order prescribing an interim plan for El Paso. See *American Smelting & Refining Co. v. F.P.C.*, No. 72-2204, CADC, slip opinion issued January 21, 1974. While the Court excused noncompliance with NEPA in formulating an interim plan, Part VI of the opinion (pp. 46-48) makes clear that the Court will require compliance before a permanent plan is prescribed, unless statutory impossibility is demonstrated.

[5]*Atlanta Gas Light Co. v. F.P.C.*, 476 F.2d 142 (CA5, 1973), at 150.

[6]*Calvert Cliffs Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (CADC, 1971); *Atlanta Gas Light Co. v. F.P.C., supra; American Smelting & Refining Co. v. F.P.C., supra;* and

should, therefore, delay no longer the implementation of NEPA procedures, even though this will require a continuation of El Paso's interim plan[7] until the environmental impact of that plan, and alternates thereto, are studied.

II.

As indicated, I do not believe we can validly prescribe a permanent curtailment plan in the absence of Section 102(2)(c) environmental impact studies. The majority's rejection of this view, and their consequent adjudication of curtailment priorities and implementation, necessitates an expression of my disagreement concerning one aspect of the disposition of the case on its merits. I dissent to the determination that the distinction between firm and interruptible sales in the El Paso system should be ignored.

III.

When an agency such as ours is called upon to implement rationing by administrative fiat, we are confronted at the outset with the inescapable fact that there is not enough of this precious fuel to go around, and someone must be told that he must shoulder the burden of first interruption.

I consider it appropriate for us to approach this most difficult problem by considering the impact of our curtailment orders; if the result of our orders is to impose

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see *Scientists' Institute for Public Information, Inc. v. A.E.C., et al.*, 481 F.2d 1079 (CADC, 1973) holding that uncertainties in an agency's evaluation of environmental impact does not justify noncompliance.

[7]The interim plan should be evaluated, and modified where necessary, in accord with the Court's mandate in *American Smelting, supra*, and particularly the orders entered by the Court of Civil Appeals on May 22, 1974 and June 10, 1974. This should be the function of the present opinion, rather than attempting to prescribe a permanent plan at this time.

curtailment on some who have no means of using an alternate fuel, at a time when there are other customers on the pipeline system who can utilize alternate fuels, a decision to authorize the flow of gas to the fuel-sufficient customer is very difficult to defend.

I consider it appropriate for us to consider also the historic facts concerning gas usage on a given pipeline system; if one class of customers has historically paid a higher price in return for the apparent guarantee of preference in gas service, while other customers have paid a lower price in recognition of the pipeline's acknowledged right to interrupt that service, the *quid* has been paid and it is time for us to put the *pro quo* into the transaction.

In the evolvement of our curtailment policies, considerations such as these led us to say in Opinion 643, *Arkansas Louisiana Gas Company,* Docket No. RP71-122:

> ". . . [T]hose customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property." (49 FPC 53 at 66; Footnote omitted.)

Subsequent to the issuance of Opinion 643, we recognized the wisdom of granting firm gas service a preference over interruptible gas service in every curtailment proceeding that came before us. We acknowledged this to be our policy view when we issued Order 467-B in Docket No. R-469.

After reviewing this record, I am persuaded that the same policy considerations apply to the El Paso Southern Division curtailment, and I think we should accord a preference to firm service over interruptible service for this pipeline, not because we previously determined that such should be done, but because this record demands such treatment if a just and reasonable and nondiscriminatory program of curtailment is to be carried out.

IV.

This record reflects that interruptible service rendered in California has been rendered, historically, at a rate lower than that charged firm industrial customers. Using the year ended December 31, 1971, for comparison, it appears that interruptible loads were paying 32¢ to 34¢/Mcf while the B-1 rate customers were being charged from 35.66¢/Mcf to 37.97¢/Mcf. The B-1 customers are all located east of California, so it is obvious that the California interruptible market received its gas at a rate substantially lower than the quoted figures would indicate once the additional cost of transportation is taken into account.

The record further indicates that California interruptible customers whose requirements are in excess of 200 Mcf per day are required by state law to maintain alternate fuel facilities. I can find nothing in this record indicating that these interruptible customers cannot utilize alternate fuels.

Given these facts, I can find no acceptable reason for eliminating the distinction between firm and interruptible service.

V.

The majority concludes that the distinction between firm and interruptible service should not be recognized on the El Paso Southern Division because (1) recognition of the distinction would result in curtailment falling heavily on the California industrial market while gas used for the same purposes east of California would have a lighter curtailment burden (majority opinion, pp. 5 and 6) and (2) California interruptible customers became such because of state law and not because of a conscious decision to choose interruptible service (majority opinion, pp. 6-7).

I find neither reason persuasive, but before addressing the substance of the matter, it is necessary to worry for a moment about the language chosen by the majority in discussing this issue. The majority says:

> "Adoption of the Order No. 467-B priorities for the El Paso Southern Division System would result in virtually all the E-O-C industrial customers with requirements in excess of 200 Mcf daily escaping curtailment until such time as California customers with similar requirements had been totally curtailed. By virtue of his firm contract, the E-O-C industrial customer would be entitled to a higher priority curtailment category despite the fact that his use for gas was the same as, or even inferior to, that of his California counterpart. For example, while California industrial consumers were being curtailed, the full contract requirements of the electric generating facilities of Ari-

zona Public Service Company, Tucson Gas and Electric Company, El Paso Electric Company, and the Salt River Project, all of whom purchase under firm direct sales contracts, would continue to be served." (pp. 5-6.)

This language invites grave misunderstanding. We do not, and cannot, control the volume of gas that will be delivered to the California industrial customers. These customers are served by distributors which purchase gas from El Paso and the function of our curtailment plan is only that of determining the allocation of gas which the California distributors are to receive from El Paso. How that gas is then allocated within the State of California rests with the California distributors and the California Public Service Commission.

I consider it vital that there be no misunderstanding on this score. This Commission has not undertaken to dictate the end uses to which natural gas is put at the point of ultimate consumption. We have left this decision to the state regulatory commissions. Once we determine the allocation to be made by the pipeline to the distributor (which allocation we make in terms of end-use patterns), we have had our say; any state may choose to allocate the volumes which a distributor receives from an interstate pipeline on a different pattern of end-use priorities than the ones that we apply for allocation purposes. The state commissions must have this freedom, I believe, in order to be responsive to the multitude of local considerations which are beyond our knowledge and beyond our capacity to evaluate.

VI.

I turn to my reasons for disagreement with the substantive matters as stated in the majority opinion. The first, as noted above, is that the impact of curtailment on the California industrial market *vis-a-vis* the east of California industrial market should be lightened. This conclusion seems erroneous to me because the California industrial customers that raise concern with my colleagues are precisely within the category of gas users best equipped and best able to handle the initial burden of curtailment. These industrial customers do indeed have alternate fuel capacity; their alternate capacity is in place and in operation. They have access to alternate fuels.

The majority is led to depart from the firm/interruptible distinction because the regulatory policy of the State of California has been one which prohibits large industrial sales from being made on a firm basis if alternate fuels can be used. But this policy does not negate the incontestable fact that substantially all of the California interruptible service satisfies the very considerations that the Commission relied upon in concluding that interruptible requirements should be curtailed first. The fact that state policy may have had a hand in creating conditions which comport with federal policy surely provides no justification for declining to carry out federal policy. Indeed the very opposite would seem to be true. It was indeed the policies of the California Commission which have permitted the California distributors to purchase gas at a 100 percent load factor and thereby minimize the average cost per Mcf to all classes of customers in California, residential, commercial and industrial.

VII.

The majority also eliminates the distinction between firm and interruptible service on the El Paso Southern Division because of its conviction that the status of the California industrial contracts as interruptible reflects state policy and does not truly reflect "the intensity of a purchaser's need for gas." (Majority order, p. 6.) I disagree. The very fact that the California industrials have operated under interruptible contracts for a long period of time is indeed a measure of the intensity of their need. If we concern ourselves only with the facts of record here, it seems inescapable that the California interruptible industrial market does have alternate fuel capacity in place and operational. The firm customers of El Paso which are located to the east of California and which never envisioned the interruption of service because they had firm contracts are not so prepared for curtailment at this time. As Nevada Power Company puts it:

> "Interruptible end users on El Paso's system, such as SoCal Edison, have bought natural gas at lower prices and have alternate fuel facilities already operational. Firm end users, such as Nevada Power, have paid higher prices for the assurance of a firm gas supply and, consequently, were not expected to install—and had not in fact installed —equivalent alternate fuel capacities." (Nevada Power Company's Brief on Exceptions, p. 7.)

I cannot, in good conscience, ignore the realities of the present in order to reconstruct what might have been if California regulatory policy had been different.

/s/ Rush Moody, Jr.
Rush Moody, Jr., Commissioner

El Paso Natural Gas Company. Docket No. RP72-6. (Issued June 14, 1974).

SMITH, Commissioner, *dissenting in part:*

An environmental impact statement to accompany a "major federal action significantly affecting the quality of the human environment"[1] must be prepared "unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C. Circ., 1971). The Federal Power Commission has a "statutory duty to the public to take effective *interim* curtailment action in the exigencies presented by gas shortages," *Atlanta Gas Light Company v. Federal Power Commission,* 476 F.2d 142, 150 (5th Circ., 1973). Thus, where it is impossible to prepare the NEPA statement within the time necessary to implement the interim plan in the emergency situation, the statutory duty of the FPC and NEPA requirements are inconsistent and the former prevails. See *American Smelting and Refining Company v. Federal Power Commission,* No. 72-2204 (D.C. Circ., 1974). However, where there is ample time to prepare the impact statement prior to fulfilling the statutory obligations, by the implementation of a final curtailment plan, it is not impossible to prepare the impact statement, it is only *difficult* to make the judgments necessary to formulate environment analysis. "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the

[1]NEPA §102(2)(c), 42 U.S.C. §4321.

section (NEPA 102) of its fundamental importance." *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, supra.

The court in *American Smelting and Refining Company v. Federal Power Commission*, No. 72-2204 (D.C. Circ., 1974) recognized that in a situation requiring "prompt" action, the impact statement is not required, but the court also clearly indicated an expectation that an impact statement would be prepared for consideration with the final curtailment plan in this case.

The failure to prepare an environmental impact statement to accompany the final El Paso curtailment plan will almost certainly result in the implementation of the plan being substantially delayed. "(M)eaningful consideration of environmental factors (must be given) at all stages of an agency decision making." *Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F2d 1079, 1091 (D.C. Circ., 1973); *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, supra at 1114. The reversal of the final curtailment plan because of absence of the environmental impact statement would render necessary a reconsideration of substantially all other issues relating to the curtailment plan. This would cause further unreasonable delay in the implementation of a fair, equitable, and final curtailment program. The attendant time, expense, and business uncertainty should be minimized.

Neither "expertise and devotion to the public interest" (Order, p. 18) nor "knowledge and experience . . . gained through years of intimate association with the transmission and distribution functions of the gas industry" (Order, p. 19) can substitute for compliance with a statutory requirement, particularly when a reviewing court has clearly signalled its attitude towards the matter.

I dissent to the failure of the majority to direct Staff to prepare a NEPA statement, and otherwise concur with the disposition of the case.

/s/ Don S. Smith

Don S. Smith, Commissioner

APPENDIX B.

Presiding Judge's Decision on Curtailment Plan.

United States of America, Federal Power Commission.

El Paso Natural Gas Company. Docket No. RP72-6. (June 5, 1973).

APPEARANCES

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William R. Duff and *Henry E. Brown* for El Paso Electric Company; Magma Copper Company; Phelps Dodge Corporation; Salt River Project Agricultural Improvement and Power District

William J. Derrick for El Paso Electric Company

John F. Mills for Magma Copper Company

Leroy Michael, Jr., and *Richard H. Silverman* for Salt River Project

Earl H. Carroll for Phelps Dodge Corporation

John T. Ketcham, Charles E. McGee and *Robert G. Haggerty* for Southern Union Gas Company and Pioneer Natural Gas Company

James R. Wetherbee and *A. S. Grenier* for Southern Union Gas Company

Jerry Hopson for Pioneer Natural Gas Company

Israel Butler, Thomas D. Clarke, K. R. Edsall and *Norman J. Provost* for Southern California Gas Company

Robert W. Tollen, Sherman Chickering, C. Hayden Ames and *Donald J. Richardson* for San Diego Gas and Electric Company

David D. Mix, John D. Maharg and *John W. Whitsett* for Air Pollution Control District of the County of Los Angeles

Walter F. Wolf, Jr., for The Navajo Tribal Utility Authority

Rufus G. Thayer, Jr., Lawrence O. Garcia and *Mary Moran Pajalich* for The People of the State of California and The Public Utilities of the State of California

Mrs. Lilyan Goode Sibert and *Renn C. Fowler* for General Service Administration, Office of General Counsel

Frederick G. Von Huben for Community Public Service Company

William S. Martin, Jr., for The City of Lordsburg, New Mexico

Henry F. Lippitt, II, for The Nevada Industrial Customers

Reuben Goldberg, Leo J. Steffan, Jr., for Nevada Power Company

Darrell Clark, Charles H. McCrea and *Lawrence V. Robertson, Jr.*, for Southwest Gas Corporation

H. Robert Barnes, R. E. Woodbury, Robert J. Cahall and *William E. Marx* and *Alan Nedry* for Southern California Edison Company

John H. Engel for The Citizens Utilities Company

Arthur T. Devine, Roger Arnebergh and *Edward C. Farrell* for Department of Water & Power, City of Los Angeles

Richard M. Merriman, Peyton G. Bowman, III, and *Brian J. McManus* for City of Mesa, Arizona, and Arizona Public Service Company

Robert T. Hall, III and *N. H. Powell* for Arizona Public Service Company

J. LaMar Shelley and *Robert T. Hall, III* for The City of Mesa, Arizona

Thomas F. Brosnan, A. Y. Holesapple and *Lawrence V. Robertson, Jr.* for Tucson Gas and Electric Company

Jerome Ackerman and *James R. McCotter* for American Smelting and Refining Company, Compania Minera de Cananea, S. A., Inspiration Consolidated Copper Company, and Kennecott Copper Corporation

Timothy M. Kelleher, Daniel E. Gibson, Frederick T. Searls, Malcolm H. Furbush and *Katy Todrank* for Pacific Gas and Electric Company

William G. Riddoch, Thomas G. Johnson and *Dan A. Bruce* for Shell Oil Company

Heber P. Hardy for Public Service Commission of Nevada

Edward J. Grenier, Jr., George Mabry and *Richard P. Noland* for Johns-Manville Corporation and seven Nevada Industrial Customers of Southwest Gas Corporation

Douglas W. Fraser for New Mexico Public Service Commission

Edward J. Grenier, Jr., and *Richard P. Noland* for Johns-Manville Products Corporation

Kermitt L. Waters for the City of Las Vegas, Nevada

Richard P. Noland, Edward J. Grenier, Jr., Ross L. Malone and *William A. Vaughan* for General Motors Corporation

James N. Horwood for City of Willcox, Arizona and Arizona Electric Power Cooperative, Inc.

Platt Davis, Jane Nix and *James M. Broadstone* for the Staff of the Federal Power Commission

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FRIBOURG, Presiding Administrative Law Judge: El Paso Natural Gas Co. (El Paso) on July 6, 1971, filed proposed new tariff sheets to provide new priorities on its Southern Division System in the event that shortage of gas supplies required it to curtail deliveries to its customers. It proposed to allocate the firm reliable capacity of the system[1] among its customers and to cut service according to the new priorities if service has to be cut.

I. *Statutory Background*

Under Sections 4 and 5 of the Natural Gas Act,[2] companies subject to it are prohibited from maintaining any unreasonable differences in service and are required to have just and reasonable rules and regulations. If the Commission, after hearing, finds a classification, rule, regulation or practice to be unjust, unreasonable, unduly discriminatory or preferential, it

> * * shall determine the just and reasonable * * classification, rule, regulation [or] practice to be thereafter observed and in force and shall fix the same by order * *

This statutory background is mentioned to show the nature and limits of the problem. It is necessary first to determine that the present rules are unjust, unreasonable, unduly discriminatory or preferential, and second to make an order that is not.

The large number of parties and briefs makes it impossible, within the compass of a decision of reasonable length, to answer in detail every suggestion made and every position taken, though each has been con-

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[1]All such references are to El Paso's Southern Division System, no other properties of El Paso being involved here.

[2]15 USC § 717c, 717d.

sidered, and those material to the order here made have been answered by acceptance or rejection, explicit or implied. The attempt here is to make a reasonable order. It does not follow that all other possible orders are unreasonable.

II. *The Present Rules*

El Paso itself states in its brief that "* * gross inequities would result if curtailment were instituted in accordance with the procedures prescribed in El Paso's existing tariff and gas sales agreements * *" and the record confirms this. If such curtailments were required, service to the California distributor customers for any purpose would be the last to be cut. Thus, elimination of commercial and even residential service east of California would precede any reduction of California's industrial boiler-fuel requirements.[3]

In Opinion No. 634, ... FPC ...., October 31, 1972, the Commission spoke of this very question in fixing emergency rules for the 1972-3 heating season. It said (slip op., p. 3):

> * * It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system.

[3]The City of Willcox, Ariz., disagrees with El Paso's interpretation of its own tariff and points to tariff provisions which, it says, would cut service to California in times of shortage but leave El Paso liable in damages to its California customers for failure to deliver. Willcox's interpretation, if correct, would leave El Paso in an intolerable position and thus supports, rather than negates, the proposition that the tariff is unjust and unreasonable.

It found the current rules to be discriminatory and violative of Section 4(b) of the Natural Gas Act. The Presiding Judge would so find on the basis of the record even absent a Commission holding. However, that holding appears to foreclose further consideration of the question. If the currently effective plan is discriminatory and unlawful for a temporary period, one can hardly contend with any conviction that it can properly be retained permanently. It is as improper for the future as for the present, and for the same reasons.

The proposed revised tariff sheets, filed July 6, 1971, have not been placed in effect. Only the Commission's interim orders (Opinions Nos. 634 and 634-A) prevent the old rules from being effective now. As previously noted, the old rules are unjust and unreasonable. It could be contended, however, that it is the rules embodied in the proposed tariff sheets that must be found unjust and unreasonable before new ones can be fixed by order. If so, that finding is hereby made for the reasons stated below.

El Paso's plan would allocate existing capacity among its customers and would establish a curtailment system based on those allocations. The two California customers, which have been served as to part of their requirements on a contract demand basis, would be allocated capacity equal to their contract demands.

The East of California (EOC) customers have historically been served their full requirements on one-

part straight rates. They would be given allocations less than their historical usage. Consequently their curtailments would start from a lower base, measured in relation to past takes, than those of the California customers. In effect, they would be curtailed first by force of the allocations, not as a result of any differences in the use of the gas. That is arbitrary.

The plan would require El Paso's distibutor customers to execute new service agreements and its direct sale customers to execute new contracts, all reflecting the new entitlements and none limited to the duration of the shortage. These provisions would materially change El Paso's basic obligations and go far beyond what a curtailment plan may properly include. The staff and certain intervenors, *e.g.*, Nevada Power Co., correctly argue that the plan is a partial abandonment of service and as such violates Section 7(b) of the Natural Gas Act. Whether this is true or not, the Act gives a pipeline no authority to require modification of its contracts with its customers without their consent. Yet a portion of the cutbacks contemplated by the plan would be permanent cutbacks. That is, they would continue even if the shortage disappears, as El Paso's own witness admitted.

A curtailment proceeding is undertaken so as to decide how a natural-gas company should apportion an inadequate supply. Revision of contracts is rarely, if ever, necessary to such an apportionment or appropriate to such a proceeding. Allocation of capacity as El Paso proposes would distort the entitlements on

which curtailment should be based. For the foregoing reasons the plan is found to be unjust and unreasonable.

III. *A Just and Reasonable Plan*

A. *Statements of Policy*

The Commission has issued several statements of policy on curtailment of deliveries by jurisdictional pipelines. In Order No. 467[4] it stated its intention to set forth categories of use that would be generally applicable throughout the industry and could be utilized as to any pipeline for establishing priorities in periods of short supply. It has been argued that the Presiding Judge is bound by the Commission's statements of policy. It has also been argued that since the parties had no notice of Order No. 467 they cannot be bound by it until the record has been once again reopened to permit them to put in more evidence on the impact of the priorities set forth in the order. One litigant claims that aggrievement would occur if he must confine his arguments "to the evidence which the record already contains by pure chance."

The position that pure chance is responsible for the evidence gives too little credit to the efforts of counsel and witnesses. Counsel have worked with diligence and ability to create a record that will properly reflect the best interests of their clients. A decision based on the record is surely no worse for being consistent with Order No. 467, and the parties gain no rights as a

[4]Docket No. R-469, issued January 8, 1973.

result of the issuance of the order either before the decision or after.

That is not to say that the order is without influence on the decision. A policy statement is a statement of how the Commission will exercise its discretion. *Attorney General's Manual on the Administrative Procedure Act,* f.n. 3, p. 30. It is not governed by the Administrative Procedure Act, see 5 U.S.C. § 553(b), nor is it reviewable under the terms of the Natural Gas Act, *United Gas Pipe Line Co. v. F.P.C.,* 181 F. 2d 796, cert. denied 340 U.S. 827. It can not validly contravene either the record or the statute, but may foreclose unnecessary argument where the Commission's judgment is capable of exercise in one of two or more ways that the record permits, or where record support for its decision is not required.

The categories of priority set forth in the original policy statement have since been modified, but the basic policy remains in several important respects. As the Commission itself has said, in its Order (dated April 25, 1973) Denying Motions for Reconsideration, etc., of Order No. 467-B,

> * * * The stated priorities are intended to be a safe starting point from which deviations may be made based on an evidentiary record.

B. *Procedure in Special Cases*

The Commission has stressed this emphasis on the evidentiary record. In its original statement of policy, Order No. 467, it said:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

This quotation, repeated in Order No. 467-B, issued March 2, 1973, is no empty utterance. Permission was granted to the City of Willcox, Ariz., and Arizona Electric Power Cooperative to show that they should be exempted from the terms of the temporary curtailment plan on the ground that it would be impossible to switch to an alternate fuel as the plan implicitly contemplated.

The claim was heard and decided. It is worth noting that it was decided in the presence of only the few counsel for parties who were interested in this special issue, though all parties were given opportunity to be heard. A separate decision was issued and the rest of the case was in no way delayed. Provision has been made for somewhat similar handling of a special issue raised by Arizona Public Service Corp., Southern Union Gas Co., and Southwest Gas Co.

There is therefore no reason not to issue a decision that fixes curtailment rules as to the matters encompassed by the record or which can be decided as matters of policy (absent any conflict between policy and record), leaving for special treatment any issues that may be raised by a claim that the rules operate unfairly in particular instances or as to particular parties. The broad principles have been established by the policy statement insofar as the record does not conflict with it. There has been opportunity to argue the principles, they have in fact been argued, and decision can properly be made.

C. *End Use and Contract Entitlements*

It is unequivocally the policy of the Commission that priority shall depend primarily upon the nature of the end use of the gas rather than on contract entitlements. The reason is

> * * simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource.

This quotation, which the Commission used in Order No. 467, is from *Arkansas Louisiana Gas Company,* Opinion No. 643, January 8, 1973, and was echoed in *United Gas Pipe Line Company,* Opinion No. 647, January 12, 1973.

Despite the arguments of numerous parties, nothing in the record limits the Commission's policy preference for end use, rather than contract provisions, as a basis for curtailment.

San Diego Gas & Electric Company, a customer of El Paso's customer, Southern California Gas Company, points out that Southern California Gas was required to curtail its customers to some degree virtually throughout 1971 and substantially for years before that. San Diego urges that the quality of service that is called for in the various service agreements be considered in apportioning cuts at this time. Specifically, it objects to pro rata curtailment of industrual loads on the ground that it would deprive California customers of their right to demand their daily contract volumes, so that they would be paying demand charges for gas they cannot demand. The E-O-C customers, if they are to be cut by equal percentages of their volume requirements, would feel no such burden because they pay no demand

charge. Furthermore, El Paso's two California customers have a 91% minimum bill provision in their contracts.

It may be conceded that the financial burden of curtailment does not fall evenly if like users are given like treatment. But the converse is true as well. Users would not be even-handedly treated as to supplies if financial considerations alone are to govern. The Commission recognized this in Order No. 467 when it said:

> In determining our priority-of-service listing, we are cognizant of the economic impact that will flow from that listing.

It nevertheless chose end use as a basis, on the ground that customers with like uses should be treated as a class "to avoid any undue discrimination or preference among them." It does not bar all discrimination among such customers, but it bars putting some of them ahead of another class and others behind.

This is in effect a decision that ordinary financial impact, that is, impact common to large classes of users, is a consideration secondary to that of end use. It does not mean that a user on whom the impact is such as to warrant special treatment must go unheard. As has been seen, provision is made for exceptional cases, but the general rule holds.

The choice of end use as a criterion also means that the priority system should be based on the use of the gas at the burner tip. To regulate local distribution is, of course, beyond this Commission's jurisdiction, but there is no reason why it should not regulate El Paso's sales according to the way the gas is ultimately used. This necessarily will involve ascertainment by El Paso of the ultimate disposition of its gas.

The choice of end use points up a deficiency in the Ransom plan, which is a plan put forward by certain E-O-C parties. Under this plan, California and east-of-California areas would share ratably in curtailment. Such a geographic division is arbitrary. A user should not receive either more or less gas merely because he is in one place instead of another. Curtailment should be proportionate within the priority that is being curtailed rather than being assigned by localities according to their total takes. California accounts for about two-thirds and E-O-C one-third of the system's volume. It does not follow that curtailment should be in these proportions. The use of the gas is what counts.

The Ramsom plan also is defective in that it would give higher priorities for gas used to generate electricity for domestic purposes than for other purposes. This approach has already been rejected by the Commission, see *Arkansas Louisiana Gas Co.*, Opinion No. 643, pars. 35-36, and would be rejected by the Presiding Judge even were it a matter of first impression. It would be impossible to assess the social values of the products made by the users of El Paso gas and to award priorities accordingly.

The question is not what products should be favored by providing gas for their manufacture but rather where the burning of gas can most usefully be cut. This involves such decisions as the best place to use a substitute, the environmental effect of substitution, the relevance and force of contractual arrangements, and other matters considered herein. To go beyond the end uses of the gas to the end uses of the products made with its energy is wholly impractical. Limiting the use of gas as boiler fuel does not imply a judgment as to the social value of the boiler, or of the ultimate product of the process of which the boiler is a part.

D. *Boiler Fuel*

Curtailment is primarily a matter of transportation and of allocation of the available supply. Finances, rates and contracts are secondary considerations, though they may be important. In *Michigan Consolidated Gas Co. v. F.P.C.*, 203 F. 2d 895, 900 (C.A. 3, 1953) it was said that "The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence."

The City of Willcox, Arizona, argues that there is no record fact to support the judgment that boiler fuel is an inferior use. None is necessary. The Commission has sufficient expertise to know that this is an inefficient way to use gas. It has previously condemned the use of gas to generate electricity where alternate fuels could be used. *South Georgia Natural Gas Co.*, Docket No. CP71-167, Opinion No. 627, Sept. 21, 1972, ... F.P.C. ..... It may, and does, take notice of the fact that to burn natural gas to make steam in boilers so as to convert its inherent energy into electricity or mechanical energy loses about two-thirds of the heating value of the gas used. It is a reasonable exercise of judgment to hold this inefficiency unacceptable in times of shortage. And the Commission may draw on its knowledge of the industry to find, as it has found, that those who use gas as boiler fuel can usually switch to substitute fuels more readily than householders or small commercial establishments, and to find also that when they do so they can install pollution controls more praticably than can other type of user. *Arkansas Louisiana Gas Company*, Opinion No. 643, *supra*.

The statements made in par. 46 of Opinion No. 643, given in outline in the preceding paragraph are here

adopted as part of this decision, not as matters of record but as matters of official notice.

For purposes of this decision, boiler fuel is defined as natural gas used as a fuel for the generation of steam or electricity, including the utilization of gas turbines[5] for the generation of electricity. *United Gas Pipe Line Co.,* Docket Nos. CP73-117 *et al.,* Order issued March 8, 1973, p. 7.

E. *Firm and Interruptible*

In one respect the Commission has drawn a distinction based on contract provisions. Order No. 467-B, Docket R-469, the latest of the statements of policy on curtailment, sets forth nine levels of priority, the last four of which are interruptible requirements of various magnitudes. The basis for this is outlined in *Arkansas Louisiana Gas Co.,* Opinion No. 643, *supra,* p. 9, and 643-A, issued April 10, 1973. It is that interruptible sales are generally to customers who can either switch fuels or do without, and that curtailment should fall first upon those who historically have paid less than the full costs of providing service and who do not need uninterrupted service for the protection of life or property.

The State of California objects to the priorities listed in Order No. 467-B on the ground, among others, that it discriminates against California users because of the special provisions of California regulatory policy.

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[5]In 1970 the national average heat rate for fossil-fueled steam-electric plants was approximately 10,000 Btu per net kwh, *National Power Survey,* Part I, p. 5-7. The corresponding figure for gas turbine generating units was 12,500 to 15,500 Btu per kwh, *Id.* p. I-8-5. (The higher figure indicates less efficiency). It is therefore appropriate to include turbines in this classification. See also Docket No. R-474, Notice issued March 26, 1973, proposing, *inter alia,* this definition of boiler fuel.

In California, a customer for industrial service in excess of 200 Mcf daily is required to maintain alternate fuel facilities. The State claims that insofar as Order No. 467-B downgrades interruptible and alternate-fuel-capacity customers it unfairly disadvantages those California users who are prevented by State policy from becoming firm customers.

As the staff correctly argues, the traditional option of choosing interruptible service at a lower rate has not been available there. The fact that these California users have contracts of a particular type need not reflect the intensity of their need for gas. There is no reason to put them into a different class from, say, Nevada Power, to the extent that both use gas for boiler fuel to create electricity, even though Nevada Power's contracts with its supplier are to a large extent firm.

The result of these considerations is this: that buyers whose use is similar fall, in the first instance, into the same class. Within that class, it is reasonable to have priorities that reflect existing contractual relationships to the extent possible. In this regard the arguments put forward by Pacific Gas & Electric Company and others are appealing. Patterns of reliance that are woven into the whole web of contractual relationships should not be ignored. Similar industrial uses may be either senior to or subordinate to other types of use, but among themselves contractual considerations may properly govern. The public interest requires subordination of boiler-fuel use. It does not require that all boiler-fuel users be treated alike. After the superior uses are taken care of, no purpose is served by shifting boiler-fuel gas from one user to another in disregard of El Paso's contracts. The same reasoning holds as to like industrial uses other than boiler fuel.

Where El Paso has a firm contract with a distributor, this contract should protect the customers of that distributor against curtailment as long as gas flows to buyers whose use is the same as that of the distributor even though the gas does not reach them via a firm contract between El Paso and El Paso's customer. That is, if a distributor has a firm contract with El Paso and sells on an interruptible contract for boiler fuel use, the second contract should be treated as firm for purposes of allocation of priorities.

Otherwise, El Paso's customer, though having a firm contract, would find its receipts of gas being cut as though the contract were interruptible. This would cause hardship to the California customers because of the demand charge and minimum bill features of their contracts with El Paso, which have already been alluded to, see p. 11, *supra*. They would be curtailed while remaining liable to El Paso. It is therefore provided that a firm contract with El Paso shall cause that gas to be treated as firm, whatever the nature of any subsequent contracts for it.

This does not put any use ahead of any other. It merely provides that gas that is the subject of a firm contract will, for priority purposes, be treated as firm, while gas which is for a like use but which is the subject of interruptible contracts all the way from El Paso to the burner tip will be treated as interruptible. It does not, of course, affect the highest priorities such as residential, where the priority is not dependent on the nature of the contract.

In this way El Paso's normal relationships with its customers will be protected so far as the public interest permits. This is admittedly not the priority the Com-

mission had in mind in Order No. 467-B, but this situation was not there envisioned. This record, because of the differences in historical contractual development between California and E-O-C, does not support identical treatment among all boiler-fuel users.

What is done here is not a contradiction of the 467-B priorities, but rather a recognition that in the light of this record weight should be given to the historical differences. The Commission itself gave various priorities to the same type of use depending on whether the user's contract was firm or interruptible.

It is therefore ordered that "firm industrial requirements for boiler-fuel use * * * where alternate fuel capabilities can meet such requirements", *i.e.*, priorities 5 and 6 as fixed below, p. 28, shall include, *inter alia*, all gas for that use sold by El Paso under firm contracts. Like treatment shall be given to gas sold under priority 3. It is emphasized that this is based on the peculiarities of this record and that it is not intended as a precedent for situations where the use of this approach would result in remote ultimate users deriving an unreasonable advantage over identical users who buy directly from a pipeline under interruptible contracts.

F. *Commercial Loads*

The Commission's policy statement, Order No. 467-B, gives highest priority to residential and small commercial requirements, and defines small commercial as less than 50 Mcf on a peak day. Nothing in this record supports the 50 Mcf cut-off point. The staff witness selected that point without giving any reason for the selection, and he and staff counsel explicitly limited this portion of his testimony to the interim period now covered by Opinion No. 634.

There is, however, sound basis for fixing the cut-off point at 200 Mcf per day at least as to commercial loads and perhaps as to all loads. Southern Union's Vice-President, Mr. Oran L. Haseltine, testified that there are some industrial customers who are so small that to curtail them would be "an extremely difficult problem logistically and a rather meaningless exercise." He said that anything below a 200 Mcf per day range would be a virtually noncurtailable load and certainly should not be subject to the first stages of curtailment. It seems obvious that the same would be true as to commercial customers.

That this is a reasonable cut-off point is also indicated by the regulatory policy followed by the State of California. As previously noted, customers in that state who use over 200 Mcf per day are required to maintain alternate fuel capabilities, and are interruptible. For purposes of this decision they are being treated as firm, since they buy gas that El Paso sells as firm gas to Southern California Gas or Pacific Gas & Electric. All of the E-O-C commercial users also buy under firm contracts, either of their own or of their supplier.[6] Therefore, fixing the cut-off at 200 Mcf per day will result in all commercial users being treated alike throughout the system.

G. *Navajo Tribal Utility Authority*

This authority, a creation of the Navajo tribe with approval of the Secretary of the Interior, claims that El Paso's commitment to furnish 15,000 Mcf per day should not be reduced because (1) the consideration for the commitment was the grant of rights-of-way and

[6]If there are exceptions to this, application may be made for extraordinary relief.

easements to El Paso across tribal lands and (2) reduction of the commitment is an unconstitutional taking of property without due process.

Neither argument has force. The commitment was made, and the consideration was given, after the passage of the Natural Gas Act and subject to its provisions. The Act applies to all interstate transportation of natural gas. No subsequent private contract can override the Commission's functions or oust its jurisdiction.

The Commission may require rational curtailment arrangements even though they cut across existing contracts. *F.P.C. v. Louisiana P. & L. Co.*, 406 U.S. 621, 644-5. It has authority, within Constitutional limits, to modify or proscribe contractual agreements that contravene the public interest, *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). Those limits are not transgressed here because, as the staff points out, the tribal agreement envisioned the Commission's regulation of deliveries and was made in the light of a statute the constitutionality of which is not challenged.

H. *Environmental Issues*

From the beginning of the hearings and for some time thereafter the Presiding Judge was under the impression that the Commission's order fixing the procedures for treating environmental questions in certificate cases[7] would apply also to curtailment cases such as this. If they did not apply, there were (and are) no rules fixing procedures for environmental issues in curtailment cases.

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[7]Order No. 415 and Rules of Practice and Procedure Secs. 2.80 and 2.82. Section 2.82(d) provided in part that "The applicant, staff and all intervenors taking a position on environmental matters should offer evidence for the record in support of their position * * *".

The Presiding Judge recognized that while it was not yet a decided matter whether the staff was required to present environmental evidence in a curtailment hearing, Rule 2.82 sets up reasonable procedures and he ordered them to be followed here. Specifically, on January 27, 1972, he ordered that El Paso present a witness in support of its previously-served environmental statement, that staff take a position and present evidence on the environmental impact of El Paso's proposal and that other parties taking positions on environmental matters serve environmental statements and prepared testimony by certain dates.

Staff counsel had stated (R. 3535) that staff did not plan to put on an environmental case because the personnel in the Commission's Office of Environmental Quality (now headed by Dr. Richard F. Hill, a University of Wisconsin Ph. D.) were "assigned for use by the Commissioners themselves" and were not available to testify. He explained that the people handling environmental matters in the Bureau of Natural Gas were "simply persons who were in that Bureau in various capacities prior to this time, but are not qualified as environmental experts", neither the personnel nor the funds to procure outside experts were available (R. 3538).[8]

The Commission reversed the Judge's order to the staff. By order issued March 6, 1972, it ruled that he had exceeded his authority in directing the staff to pro-

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[8]It is possible that he was misinformed. About three weeks after he made his statement Mr. Robert M. Jimeson of the Commission's Office of the Advisor on Environmental Quality and Mr. Alexander Gakner, head of the Section of Environmental Analysis of the Commission's Bureau of Power, presented a paper on air pollution controls before a convention in Dallas. *Paper No. 27a, 71st National Meeting, American Institute of Chemical Engineers, Dallas, Tex., Feb. 20-23, 1972.*

duce evidence. It recognized his belief that the situation was one in which staff evidence was particularly appropriate and perhaps absolutely necessary, but it held that his order had supplanted "counsel's discretion to select his own line of argument or theory of the case". It further held that Section 2.82 of the Rules of Practice, on which he had relied, is inapplicable to curtailment proceedings.[9]

A week later, on March 13, 1972, the Los Angeles Air Pollution Control District (APCD) moved that the Commission suspend the proceedings until the adoption of rules, and for the preparation by staff of an environmental impact statement. On March 16 it also renewed its motion to the Judge to strike El Paso's revised environmental impact statement filed December 31, 1971.

The Presiding Judge denied the motion to strike on April 6, 1972, in an effort to abide by the Commission's order and at the same time produce a record in conformity with the National Environmental Policy Act. He stated (R. 5785):

> Since the Commission has held its Rules to be inapplicable to this type of proceeding the question is not whether the environmental statement of El Paso is sufficient or insufficient under the Rules, but rather whether the record as a whole permits a decision that complies with the National En-

[9]On December 18, 1972, the Commission issued Order No. 415-C modifying Section 2.82 so as to comply with *Greene County Planning Board v. F.P.C.*, 455 F. 2d 412 (C.A. 2, 1972), cert. den. .... U.S. .... (1972). The modification still excludes curtailment cases, but requires staff to present an environmental impact statement in certain other cases. Thus the expertise which would be available for other types of cases would remain unavailable for cases like this one.

vironmental Policy Act. In my opinion this question can best be decided after the record is complete and after the briefs are in.

Therefore, the motion is denied.

Five months later, in an order dated August 22, 1972, the Commission denied the APCD's March 13 motion to terminate the proceeding and to require staff to prepare an environmental statement. In so doing, it stated its reasons why environmental impact cannot be assessed in a curtailment case. It said that the procedures of Section 102(c) of the National Environmental Policy Act (NEPA) cannot be applied to a plan that covers a situation that is merely contingent, not actually existent. The degree, length and locality of the curtailment, future atmospheric conditions and the end uses of the flowing gas, were all described as variables not measurable in advance, as were the kind and amount of substitute fuels forced into use by the curtailment. It spoke of

> "* * the impossibility of complying with the procedural requirements of Section 102(2)(c) of NEPA either prior to or after an evidentiary hearing * *" (Aug. 22, 1972, slip order, p. 6).

It declared that "* * NEPA requires us to consider environmental issues in this curtailment proceeding," but ruled that NEPA's procedures would not be followed.

Thus, in substance and effect it held that although NEPA applies, the Commission's rules do not. As previously noted, it had held earlier that the Presiding Judge may not require the staff to put on an environmental case subject to cross-examination. It evidently considers this case different from *Calvert*

Cliffs Coordinating Committee Inc. v. U.S. Atomic Energy Commission, 449 F. 2d 1109, (C.A.D.C., 1971), since here it holds that no detailed environmental statement by the staff need be considered at the hearing stage.

It evidently also distinguishes *Greene County Planning Board v. Federal Power Commission, supra,* in which the Court of Appeals for the Second Circuit required that the Commission issue its environmental statement prior to any formal hearings. Presumably, the distinction is that *Calvert Cliffs* and *Greene County* are not curtailment cases. The Presiding Judge considers himself bound by the Commission's orders, and accordingly follows them here. The Commission's August 22 order pointed out that environmental evidence would be presented by any party so desiring, and said:

> * * The process of analysis of environmental issues will be embodied in the Examiner's initial decision, and will be considered by the Commission, together with all relevant evidence in the record, before it issues its decision in this and other curtailment proceedings.
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> * * In this proceeding the Examiner has given detailed attention to seeing that a full record would be developed concerning all environmental issues. There is no reason to assume that the analysis set forth in his initial decision will be any less complete than his interest was in developing the record. (Id., pp. 8-9).

In the same order, however, p. 4, the Commission said:

> In proceedings involving the justness and reasonableness of proposed curtailment plans, the pipe-

line company cannot supply an analysis of the potential impact its plan will have on the quality of the human environment. Nor can this Commission.

The Commission considered that analysis unnecessary because the Commission's mere approval, rejection or modification of the plan itself can have no environmental effect in the absence of actual curtailment. But the situation has since changed. Curtailment of El Paso's deliveries has become an existing fact. The Commission by order dated September 1, 1972, directed that the record be reopened and hearings be held to establish emergency rules for the heating season just passed and issued an opinion and order setting the rules, Opinion No. 634, October 31, 1972. It did this without making an analysis of the environmental impact of the curtailment, though it had held in its August 22, 1972, order that such impact cannot be measured, or even identified, absent an actual curtailment situation. The record for Opinion No. 634 was in substance identical with the present one,[10] and the curtailment with which it dealt was no longer contingent, but present. The Commission held on rehearing of Opinion No. 634 that it "will continue to expect, however, the development of a complete environmental record in the hearings on El Paso's permanent curtailment plan * *." Opinion No. 634-A, Dec. 15, 1972. By that time, as the record before the Commission showed, the environmental record was complete.

Thus the Commission has held that in the present case (1) an environmental analysis must be made (2)

[10]Since Opinion No. 634 was issued there have been minor additions related to special stuations not considered in this decision.

it cannot be made by the Commission or by the pipeline because of the large number of variables and unknowns, (3) the Presiding Judge may not order the staff to put on a case and (4) his analysis will be embodied in his initial decision.

The staff argues that the record does not permit an accurate assessment of the environmental effect of any curtailment plan, either at any one time or over a period. Although it undertakes virtually no analysis of the record, one must admit that closer examination leads to the same conclusion.

The record shows that climatic conditions in the Los Angeles air basin are such that air pollution potential is high and that Los Angeles County consistently exceeds (*i.e.*, violates) the standards of air quality set forth by the Federal and State governments. This applies particularly to the contaminants, such as sulfur dioxide, that are the result of burning fuel oil.

The APCD argues that other areas can reduce air pollution by instituting more rigid controls. Undoubtedly, Los Angeles has a severe air pollution problem, but the record shows like problems in other areas, and that steps are being taken there for better control of pollutant emissions from the burning of fuels. Much of the Los Angeles problem comes from automobiles, and nothing in this curtailment plan can change that.

The record leaves open the question whether air quality can reasonably be used as the standard by which to curtail gas supply, or even whether (and if so, to what extent) it can be used as one factor in setting up such a standard. The APCD's suggestion that California's share of El Paso's gas be raised by giving it an "environmental priority", ranking ahead of any

other industrial use, would not only place the entire curtailment burden on the other states but would seem intended to shift to them a part of California's present pollution problem. Staff's argument that the APCD's proposal falls foul of the Clean Air Act of 1970, 42 U.S.C. § 1857 need not be decided. The proposal is unjust and unreasonable from the viewpoint of the Natural Gas Act alone.

This is not to say, however, that California deserves no consideration on environmental grounds. The record simply is not complete enough to say what that consideration should be, if any.

The E-O-C customers, too, have presented evidence on the subject. That of Dr. Helmut Frank, a witness fo Tucson Gas & Electric, tends to show a greater conversion cost from natural gas to oil, taking into consideration both the higher fuel cost and the cost of equipment. There is evidence that oil costs are more than 50% higher in the Tucson area than near the California refineries. There would, moreover, be extensive and expensive cross-hauling of fuels, with Texas gas going through Arizona to California and California fuel oil moving to Arizona. Dr. Frank concluded that from the viewpoints of economics, environmental damage and pollution abatement, the total costs of curtailment would be minimized if curtailment, accompanied by appropriate pollution abatement efforts, took place in California.

Although staff put on no environmental witness except in connection with the establishment of emergency rules,[11] and although it presented no environmental

[11]A staff witness was called in the reopened proceeding, but the testimony he offered on environment consisted of less than a dozen lines, all of it related solely to emergency rules. It is discussed below, page 32.

statement, staff counsel did cross-examine opposing witnesses. Staff's brief, however, does not rely on any environmental evidence so elicited, but instead points out the futility of any attempt to predict the impact of curtailment on air quality. Among the difficulties it mentions are some of those very problems on which an expert staff witness testifying from an impartial viewpoint, might have been expected to shed light.

It would perhaps have been of interest had the staff been able to present a computer study showing (1) a fuel price schedule for each grade of fuel in the areas using El Paso's gas (2) a fuel use schedule showing the amount of each grade of fuel used in each area (3) a supply schedule showing the amount of each grade available to each area and (4) a control schedule showing the degree to which each area uses anti-pollution precautions, such as, for instance, low-sulphur fuels or stack gas controls. From this, the response of fuel supply, demand and prices to various air quality requirements could have been shown.

This is no doubt only one of many such studies that could have been presented in an effort to show the effect of curtailment on the lungs and pocketbooks of the populace. In ordering the staff to present evidence, the Presiding Judge did not intend to, and did not, confine counsel to any particular line of argument or theory of the case. The study suggested might on cross-examination have turned out to be useless, or might have shown how the costs of the energy needs of the different areas would be affected by air quality requirements. This particular type of study is mentioned merely because Mr. Robert Jimeson of the Office of the (F.P.C.'s) Advisor on Environmental Quality was co-author of a somewhat similar study covering

the entire United States, prepared for a meeting of the Mexican Society of Cost Engineers held at Mexico City, October 29-November 1, 1972. The possibility of obtaining like data for the territory served by El Paso gas appears not to have been examined. It may be that staff's plea of incompetence was overly modest.[12] The Presiding Judge, however, is constrained by the Commission's ruling to agree with it.

Nevertheless, the Commission's attention is respectfully invited to the following portion of the opinion of the Court of Appeals for the Fifth Circuit in *Alabama Gas Corp. v. F.P.C.*, ... F. 2d ...., No. 72-1475, Feb. 7, 1973, because of its recency and apparent pertinence. The Court said (slip op., p. 17):

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See *Calvert Cliffs Co-ord. Com. v. United States Atomic Energy Com'n.*, D.C. Cir., 1971, 449 F. 2d 1109, 1114-15. As there noted, the legislative history of the NEPA interprets 'to the fullest extent possible' to mean compliance unless compliance would give rise to a violation of statutory obligations.

Although the court held there that compliance with NEPA would prevent due execution of the Commission's duties under the Natural Gas Act, no such time pressure exists here as existed there. Consequently, the quoted paragraph seems fully applicable. No one has

[12]No adverse inference should be drawn from any of the foregoing as to either staff counsel or the present General Counsel. Staff counsel was obviously following orders. The present General Counsel was not in the relevant chain of command at the time of the Commission's orders mentioned in this subsection.

suggested here that compliance with NEPA's procedures (*e.g.*, production of an environmental impact statement) would prevent the Commission from carrying out its statutory obligations.

The brief of the APCD reaches the conclusions that the Commission should have suspended the hearings to permit preparation and circulation of an impact statement by the Commission staff, and that the Commission should adopt adequate procedural rules to implement the requirements of NEPA. No decision is made here as to the merits of these contentions. They cannot be accepted because they are addressed to the wrong forum. The Commission has already ruled against them, and the Presiding Judge is bound by its rulings.

Staff's review of the record demonstrated to its satisfaction that "to the extent possible a complete environmental record has been developed." It finds that the environmental effect of a curtailment plan cannot be calculated either as of any one time or over the long term. It argues that the air quality of the more polluted areas served by El Paso's gas would not be appreciably affected even if more natural gas were available.[13] (A question perhaps more basic to the case is the effect of *less* being available.) It concludes that environmental factors do not warrant revisions of El Paso's proposal, that "any attempt to quantify the environmental impact on the El Paso service area would be abortive," and that in any event if an emergency

[13]Staff's derivation of this statement is dubious, as the Air Pollution Control District points out in its brief. The record fails to show some of the figures on which the conclusion rests, and tonnage figures for unlike contaminants have been added together.

arises the pipeline can alleviate the condition temporarily and the Commission will no doubt grant relief if necessary.

The Presiding Judge concurs. Examination of this record, which is the most complete record he has been empowered to produce, gives no reason to suppose that environmental considerations in the area served by El Paso gas, viewed from an overall standpoint, can be so quantified as to produce usable results. Staff in its initial brief points out that the proposals of the various parties do not solve the basic problem but rather "seek to further the self-interests of their proponents."

The latter comment can probably be applied to virtually any plan except the staff's in virtually any proceeding. It was to courteract such narrowness of viewpoint that the Presiding Judge would have required evidence from an expert capable of viewing the entire El Paso situation as a witness devoted to the broadest public interest. In the absence of such evidence and in the absence of an environmental statement by the staff (and cross-examination on it), it would appear that the staff has done as well as it can. Its conclusions as to environment are therefore accepted in every particular.

I. *Priorities*

It follows from all of the foregoing that the following order of priorities for curtailment is just and reasonable:

(1) Residential, small commercial (less than 200 Mcf on a peak day).

(2) Large commercial requirements (200 Mcf or more on a peak day), firm industrial requirements for

plant protection, feedstock and process needs, and storage injection requirements of customers of El Paso.

(3) All firm industrial requirements not specified in (2), (5) or (6).

(4) All interruptible industrial requirements not specified in (7), (8), (9) or (10).

(5) Firm industrial requirements for boiler-fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(6) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler-fuel use where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, for boiler-fuel use, where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), for boiler-fuel use, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, for boiler-fuel use where alternate fuel capabilities can meet such requirements.

(10) Interruptible requirements of more than 10,000 Mcf per day, for boiler-fuel use where alternate fuel capabilities can meet such requirements.

J. *Administration of Plan*

On this record, the calculation of deliveries to users in a priority that is to suffer partial curtailment should be based on historical use rather than on contract limi-

tations. As to California, one basis is substantially the same as the other because takes have been substantially at maximum contract levels. The E-O-C customers, meaning both the distributors and direct-sale customers, have had their requirements served 100%, but the contracts have not regularly been changed as the requirements changed. To base curtailment on contract limitations would therefore produce unrealistic and inconsistent results. To base curtailments on actual use makes unnecessary many petitions for extraordinary relief which would otherwise be filed.

In calculating California's use of El Paso's gas, allowance must be made for the fact that the two California distributors are partial-requirements customers. Hence, in accounting for the end use of El Paso's gas, a particular use would be attributable to El Paso in the same proportion that deliveries of El Paso gas to the distributor in the base period bears to deliveries of all gas to that distributor in that period.

Thus, the partial requirements buyer's base period use of El Paso gas within the lowest priority for which El Paso has any gas available is to be calculated by multiplying his requirements in that priority by his total base period takes from El Paso and dividing the result by his total base period takes from all suppliers. This will show what part of a partial requirements customer's load in a priority being curtailed is supplied by El Paso. To put it another way, it ascertains what part of El Paso's deliveries to such a customer goes to a particular priority.

An issue arose as to whether the customer's deliveries to its own storage facilities (and withdrawals therefrom) should be taken into account in the for-

mula. It is found and concluded that they should not. It is incorrect to look upon storage withdrawals as a source of supply or upon deliveries to storage as though they were sales. Storage is a method of equalizing deliveries, permitting supplies to be made available during times of peak demand by filling storage fields at other times. The formula need not allow for it because, absent any contrary indication in the record, it is to be assumed that El Paso gas will go to and from storage in the same ratio that it bears to the total supply.

When supplies of gas are insufficient for El Paso to meet its customers' requirements, curtailment shall take place in the reverse order of priorities listed in the preceding subsection. No curtailment shall be imposed upon any class unless lower classes have been curtailed 100%. "Requirements" means the amounts of deliveries that El Paso would have scheduled during any particular time period but for curtailments. The terms "residential", "commercial", "industrial", "firm and interruptible service", "plant protection", "feedstock gas", "process gas", "boiler-fuel" and "alternate fuel capabilities" are as defined by the Commission in Docket No. R-474 as those definitions may appear from time to time, except to the extent that any proceeding for extraordinary relief in the instant docket, RP72-6, may make them inapplicable.

Historical deliveries to any particular class of priority shall in the first instance be deliveries of El Paso's gas to that class during each of the twelve months ended June 30, 1973. Each month thereafter El Paso shall ascertain the amount of deliveries in each class during the preceding month, and beginning September 1, 1973, it shall begin to administer curtailments, if

any, on the basis of deliveries during the same month of the year before.[14]

Of course, since curtailment is to go by end use, El Paso must curtail not only the volumes delivered to its own customers for use in the affected priority class but also deliveries to resale customers relative to the resale customers' sales in that class. This makes it necessary to ascertain end use delivery patterns and to update that information regularly.

El Paso shall therefore obtain such information from its customers not later than one month after the end of the month covered, that is, June figures are to be reported by July 31. A customer's refusal or neglect to furnish the information at the proper time shall cause deliveries to that user to be classified in the lowest priority. Any user seeking individualized consideration of his position may petition the Commission for special treatment, such petition to be made in this docket.

A sharp issue arose between the California and E-O-C parties as to whether curtailments, if based on historical use, should go by the average day of the year or by the peak day in determining what proportion of El Paso gas available for a particular priority should go to a particular customer. The California customers, whose use varied little throughout the year, favored an average-day criterion, while the E-O-C interests naturally wanted their proportion of the available total to be measured by peak days. The method here prescribed, *i.e.*, the daily average of the same month of the previous year, will not satisfy the par-

[14]The record is bare of evidence on whether this allows enough time for the collection, tabulation and application of the figures. No doubt exceptions will be taken if it does not, and they will presumably be given due consideration.

ties' claims or desires but will avoid the maximum damage that either group's suggestion would have caused the other.

It is expected that this regular revision of the basis of priorities will encourage sales in the highest priorities. Several of the intervenors have urged that uses be stabilized, primarily with the idea of preventing further cuts in industrial uses. This would not be sound policy.

There is no reason to deny companies the right to add residential business. Such a denial would create an elite class of residential consumers on the basis that they got there first, and would rank the others below boiler-fuel users. Our limited supplies are better used by large numbers of small users, where pollution control is hard to effect and hard to police, than by a few large users where the reverse is true. If residential use is superior to others, the more gas diverted to it the better. It is just and reasonable to prefer residential use, where substitution of fuel is difficult or impossible, over industrial use where the customer is buying gas as a matter of economic preference.

Certain intervenors argue that such a policy contravenes Section 7 (a) of the Natural Gas Act which, they say, prohibits impairment of adequate service to existing customers. They cite *Granite City Steel Co. v. F.P.C.*, 320 F. 2d 711 (C.A.D.C., 1963).

The prohibitions of Section 7(a) bar the Commission from compelling a pipeline to make a new connection or new sales, or to enlarge its transportation facilities, when to do so would impair its ability to render adequate service to its customers. Here Section 7(a) is not involved. This is not an order to make a connection or a sale or to enlarge any facilities. It

merely permits what has always been permitted, namely, the growth of residential use.

The *Granite City* case is wholly inapposite. There the Commission had ordered the reallocation of a portion of the capacity of a pipeline by directing the pipeline to sell to certain of its utility customers gas which it had been delivering to its direct industrial customers. No such order is made here. The pipeline's customers are permitted to seek high-priority business, as they always have been. They are not compelled to, they are simply not barred.

As the Commission has said, *Granite City* does not detract from the Commission's authority over curtailments, *United Gas Pipe Line Co.*, 46 FPC 786, 798. It is Section 4 of the Act, not Section 7, that deals with service, and the Commission may rely on it to deal with curtailments, regardless of whether Section 7 is also applicable. *Louisiana Power & Light Co. v. F.P.C.*, 406 U.S. at p. 646.

An issue is raised as to special treatment for an emergency air pollution situation. The staff witness recommended that when an air pollution episode reaches the emergency level as designated by the Environmental Protection Agency and as declared by an air pollution control agency, "the gas curtailment may be waived to the maximum extent possible." He said:

> * * The air pollution control agency should be required to certify to the interstate pipeline that all corrective intrastate and interstate redistribution of gas has been taken within the state before such waiver is implemented.

Cross-examination showed lack of clarity as to what authority, if any, exists to require an agency to make such a certification and precisely what is meant by "all corrective . . . redistribution of gas". What length of time might elapse before the certification could be obtained was never stated, though time is obviously an important consideration in emergency circumstances.

Cross-examination also showed that the staff's intention was to give El Paso the right to waive curtailment in the emergency, to the extent that gas might be available. Whether the Commission can properly delegate the right to waive, and where the pipeline would get the additional gas, were questions which had apparently not been considered.

It is ordered, as an environmental emergency provision, that any Federal, State or local agency having jurisdiction over pollution control be permitted to apply to this Commission for diversion to its area, for the duration of an existing emergency, of gas going to other areas under priorities other than (1) and (2). The agency shall apply jointly with the user or users to whom it is proposed to divert the gas. The application shall show the nature and extent of the emergency, the extent of the proposed user's current curtailment and any plans for the return of the emergency gas at the end of the emergency.

Another issue relates to the future handling of additions to the supply of any of the partial requirements customers. The arithmetic of the formula is such that if a customer adds to his resources he would not receive

the full benefit of the addition but would share it with those who have done nothing. Certain parties are understandably concerned that such a result may flow from continued application of the formula. The matter is not really in issue, since it concerns only a future contingency, but is raised rather as a caveat to keep present remedies from being applied rigidly to future ills.

It seems best to write no prescription for future use now. It may be that to continue the formula would work unfairness. On the other hand, it may be that to give the customer the full benefit of his added resources would result in his supplying a certain priority level at a time when a higher level is being curtailed as to some other user. Whether that would be the result, and if so whether it is compatible with the public interest, are questions better left for future decision as circumstances then appear.

Mr. Arthur Markus, a witness for Johns-Manville Products Corp., suggested that all boilers on the system be ranked by size, with the smaller receiving the high priorities. The idea has some attractiveness, but its administration is likely to be cumbersome and it has other defects as well. For instance, to allot priorities boiler by boiler would not only be complex to the verge of impracticality but would tend to reward a user for keeping in use the smaller and presumably less efficient boilers. Furthermore, as Tucson Gas & Electric Company contends, a plant containing six boilers can be served from a common alternate fuel storage source and each

can be vented through a common pollution abatement device. A single plant is the smallest practicable basis for allotting priorities.

Certain parties raise a question as to compensation to be given by one user or group to another as the result of gas being diverted by the curtailment plan. The issue has no place here. As to the direct sales and other non-jurisdictional transactions, the Commission has no jurisdiction over rates, and gains none by virtue of the plan. Whether jurisdictional rates should be changed is a matter appropriate to a rate case, in which much evidence not in this record would be needed.

All electric utilities are granted a special examption from curtailment to the extent required to avoid the shedding of firm electric load for residential and commercial use and for industrial requirements for plant protection upon an attestation by the utility that (1) it faces an emergency that will require it to shed firm loads for these uses unless an exemption is granted (2) it has no alternate fuel capabilities (3) it has exhausted all purchased power opportunities and all alternative power sources and (4) it will accept reduced deliveries as soon as possible to offset the volumes taken during the exemption.

ORDER

It is ordered that

(1) El Paso shall within 60 days file revised tariff sheets in accordance with this decision.

(2) The record shall remain open for purposes of the hearing set for June 14, 1973, on the issues raised by Arizona Public Service Corp. *et al.*, as to the grouping of delivery point obligations for purposes of the permanent curtailment plan, and any matters related to those issues.

(3) The record shall remain open for purposes of the decision to be rendered on the petition of the City of Mesa, Arizona, for extraordinary relief, and for matters related to that decision.

(4) The record shall not be reopened for other purposes except on order of the Commission.

(5) El Paso shall file monthly with the Commission tabulations of the data received as to the use of its gas and as to deliveries, curtailments and curtailment exemptions for the month ended not more than sixty days prior to the filing.

/s/ Arthur H. Fribourg
Arthur H. Fribourg
Presiding Administrative Law Judge